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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1277

STATE OF MARYLAND,

Petitioner,

v.

JOHN EDWARD JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, the State of Maryland, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case (No. 3, Sept. Term, 1976, Court of Appeals of Maryland) on December 14, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, reported at 279 Md. 1, 367 A.2d 1 (1976), is included as Appendix A. of this Petition. The opinion of the Court of Special Appeals of Maryland, reported at 29 Md. App. 182, 348 A.2d 55 (1975), is included as Appendix B.

JURISDICTION

The judgment of the Court of Appeals of Maryland sought to be reviewed was filed on December 16, 1976.

This Petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., §1257 (3).

QUESTION PRESENTED

Did the Court of Appeals of Maryland erroneously reverse the conviction of Respondent for an alleged violation of Respondent's right to a speedy trial under the Sixth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the Constitution of the United States provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment of the Constitution provides in pertinent part:

> "SECTION 1. . . . [N]or shall any state deprive any person of the life, liberty or property without due process of law. . . ."

STATEMENT OF THE CASE

Petitioner first gives a broad overview of the judicial proceedings relative to the instant case and afterwards provides a more detailed description of the chronology of events, taken essentially from Respondent's brief to the Court of Appeals of Maryland.

A. Respondent, John Edward Jones, also known as "Liddy" Jones, was arrested in Baltimore County on July 12, 1972. He was subsequently indicted by the Grand Jury for Baltimore County (Indictment No. 44607), on July 27, 1972, in a multi-count indictment charging violations of Maryland's Controlled Dangerous Substance Statute. Respondent was reindicted for the same offenses on April 29, 1974, (Indictment No. 48721), because of a technical flaw in the wording of the original charging document. On May 15, 1974, Respondent, on his motion, was granted a severance from the case against himself and several co-defendants. The trial of Jones' co-defendant took place on June 7, 1974. Thereafter, he was brought to trial on December 4, 1974, in the Circuit Court for Baltimore County before a sworn jury, the Honorable Kenneth C. Proctor, presiding. On December 5, 1974, however, Judge Proctor granted Respondent's motions for a mistrial and a change of venue and ordered that the case be removed to another county. On December 11, 1974, Respondent received a jury trial in the Circuit Court for Calvert County, the Honorable Perry G. Bowen, Jr., presiding. A preliminary motion to dismiss the indictment for denial of the right to a speedy trial was argued by Respondent and denied by Judge Bowen. The trial concluded on December 13, 1974, at which time the jury returned guilty verdicts on the charges of possession of heroin with intent to distribute, possession of heroin, and two counts of possession of controlled paraphernalia. Judge Bowen then sentenced Respondent to a total of twenty years imprisonment in the custody of the Commissioner of Correction, and ordered that the sentence was to commence at the completion of a thirty year sentence Respondent was then serving in federal prison for unrelated narcotic laws violations. Thereafter, Respondent appealed to the Court of Special Appeals of Maryland alleging, *inter alia,* error from the denial of the motion to dismiss for denial of the right to a speedy trial. The conviction was affirmed, in *Jones v. State,* 29 Md. App. 182, 348 A.2d 55 (1975) (Davidson, J. dissenting). Respondent sought a Writ of Certiorari in the Court of Appeals of Maryland. The Court of

Appeals granted the Petition on March 4, 1976, limiting review to the speedy trial issue and one other issue not presently pertinent. On December 16, 1976, the Court of Appeals of Maryland (Murphy, C. J. and Smith, J. Dissenting) reversed the convictions of Respondent with instructions to the lower court to dismiss the indictment. *Jones v. State,* 279 Md. 1, 367 A.2d 1 (1976).

Petitioner seasonably seeks a Writ of Certiorari from the Supreme Court of the United States.

B. A more detailed review of the record reveals the following chronology of events between July 12, 1972, the date of arrest and December 11, 1974, the date of trial:

John Edward Jones, a/k/a "Liddy" Jones, Respondent, was arrested on July 12, 1972. On July 13, 1972, Respondent escaped from the Baltimore County jail; Respondent surrendered himself in a matter of days upon the advice of Attorney F. Lee Bailey of Boston, Massachusetts. He was subsequently indicted by a Baltimore County Grand Jury on July 27, 1972, in a multi-count indictment (No. 44607) charging violations of Maryland controlled dangerous substances laws and conspiracy to violate same on July 11, 12, 1972, in Baltimore County. He also was indicted (No. 44609) on escape charges.

On August 21, 1972, Stephen L. Miles, a Baltimore attorney, entered his appearance for the Respondent (Extract, hereinafter cited as E. at 1). On October 13, 1972, the appearance of F. Lee Bailey and his associate, Gerald Alch, as well as that of Gerald Kroop, another Baltimore attorney, were also filed (E. at 2). After a hearing on October 12, 1972, before Judge Proctor of the Circuit Court of Baltimore County,

Maryland at which Miles asked for four to six weeks for the filing of pretrial motions in the narcotics case (October 12, 1972 transcript at 10-11), that court ordered all pretrial motions in the narcotics case to be filed by November 17, 1972, and for the trial to commence no later than December 15, 1972 (E. at 6).

The State asserted its election at the October 12, 1972 hearing to try the escape charge first (T. at 10, 11), and a trial date of November 29, 1972 was set for said trial. This decision was objected to by Respondent's counsel in a letter from Alch, dated October 17, 1972, which claimed that trial of the escape charge prior to the narcotics case "would illegally prejudice the defendant," and asked that the narcotics charge be tried first. In that same letter, Alch also asked for a two week extension for the filing of pretrial motions in both cases (E. at 3-5). Samuel Green, then the State's Attorney for Baltimore County, informed Alch in a letter dated October 5, 1972, that the narcotics charge would not be tried first because "[t]he State elects to proceed with the escape case first" (E. at 8). The State did agree, however, to a two week extension to the filing of motions in the narcotics case (E. at 7), and an order extending the time to December 3, 1972 was filed on November 6, 1972 (E. at 9).

In November, 1972, the Respondent, through attorney Miles, filed several pretrial motions including a motion to try the narcotics case first, said motions being answered by the State on November 14, 1972 (E. at 10-11). November 21, 1972, was the date set for a hearing on the motions on the escape case (E. at 12).

On November 27, 1972, the Respondent and the State entered into an agreement in which the Respondent agreed to the trial of the escape case on or about January 8, 1973, which would precede the trial of the

narcotics case, said agreement being filed on November 30, 1972 (E. at 13-16).

The Respondent filed a motion for a speedy trial on January 2, 1973 (E. at 19), Respondent maintaining at trial that the demand had been previously made as early as October of 1972 (E. at 174). On January 11, 1973, the Respondent entered a plea of guilty to the escape charge, and was sentenced to a term of 13 months imprisonment. A plea bargaining agreement was filed at this time.

On January 15, 1973, William Murphy, a third attorney from Baltimore City, entered his appearance on behalf of the Respondent in the narcotics case (E. 23). Mr. Miles subsequently petitioned to strike his appearance (E. at 26-27), said petition being allowed, pursuant to the Maryland Rules of Procedure, Rule 751a, by order of Judge Proctor on January 22, 1973 (E. at 28).

Attorney Robert Frank, the fourth local attorney, whose appearance was not entered on behalf of the Respondent until June 7, 1973 (E. at 38), was tried on January 29, 1973 for attempting to bribe a member of the Baltimore County State's Attorney's Office with respect to the handling of Jones' charges. See *Jones v. State, supra,* 348 A.2d at 76.

Respondent was scheduled to surrender himself on February 20, 1973 to the Sheriff of Baltimore County to begin serving a 13 month sentence arising from his escape conviction.

In the beginning of March, Respondent's attorneys were informed by the State's Attorney's Office that several pretrial motions were still pending in the narcotics case including a motion to suppress (E. 33).

The parties agreed to a March 30th date for a hearing on the motion to suppress (E. at 35), said hearing taking place as scheduled. The Court ruled on the motion on April 9, 1973. In a letter dated April 5, 1973, the State's Attorney was informed that because of Bailey's other trial commitments, the defense demand for a speedy trial was retracted until there was notification to the contrary (E. at 36).

On May 3, 1973, the Respondent was indicted on federal indictments charging him with unrelated narcotics violations. A hearing was held before Judge Proctor on May 25, 1973, to find out who actually represented the Respondent (E. at 123). The Respondent claimed that only Stephen Miles represented him, despite the striking of Miles' appearance in January. (*Id.*) The Respondent further indicated that he had discharged Bailey and Alch, but their appearances were never stricken (E. at 124); and that he did not wish Murphy or Kroop to represent him (E. at 123; 124-125). The appearances of Murphy and Kroop were stricken (E. at 127-128). The Respondent had made it clear that his selection of counsel was based upon his determination to avoid further delay in the start of his narcotics trial. (See *Jones v. State, supra,* 348 A.2d at 71). The Court set a trial date for June 25, 1973 (E. at 37, 128; 131-132).

The Court was notified at this hearing that a co-defendant and prospective defense witness, Kevin Darby, had been killed (E. at 126, 178). In 1973, another anticipated defense witness, Joseph Perry, was killed (E. at 183-184).

On June 18, 1973, 46 days after the federal indictment was returned, the federal trial began, and lasted until July 21, 1973, when the Respondent was convicted and sentenced to a term of 30 years.

On August 22, 1973, the Maryland Attorney General's Office informed the Baltimore County State's Attorney's Office that the Respondent's trial would not interfere with the ongoing investigation of the Baltimore County Office that had been ordered by Maryland's Governor Marvin Mandel on November 11, 1972 because of allegations of corruption in connection with the Respondent's cases (E. at 40). Subsequently, Sam Green, State's Attorney for Baltimore County, was indicted on October 25, 1973, and the trial of a co-defendant of Green's and employee in his office, Louis Irvin, commenced on October 31, 1973. Green's trial began on January 1, 1974, and ended in conviction on February 6, 1974. See *Jones v. State, supra,* 348 A.2d at 77.

On September 6, 1973, Miles struck his appearance. *Jones v. State, supra,* 348 A.2d at 60. Another motion for a speedy trial was filed by Robert Frank on November 14, 1973 (E. at 41). On December 26, 1974, Frank and State's Attorney C. A. Ruppersberger agreed to a trial date of February 26, 1974, for the narcotics case (E. at 42). Frank, however, reasserted the demand for a speedy trial and indicated that while February 26 was acceptable, an earlier date would be preferred (E. at 43). Deputy State's Attorney for Baltimore County, Benjamin Bronstein, wrote to Frank on January 9, 1974, stating, among other things, that if an earlier trial date was desired, Frank should make that request to the Court. He further stated that the February 26 date was advisable in order to prevent the Respondent's case from interfering with Frank's own disbarment proceedings arising from his admitted attempted bribery of a member of the Baltimore County State's Attorney's Office scheduled to be heard on February 18 (E. at 44-45). Frank responded to the above-described letter on January 10th, reminding Bronstein that a motion for a speedy trial was filed and that it was the

burden of the State to bring the case to trial. Frank further indicated that Bronstein should not be concerned with the possible interference with his [Frank's] disbarment proceedings (E. at 46-47).

On February 8, 1974, Judge Proctor wrote to the State's Attorney's Office to inform them that the Respondent's case had to be removed from trial assignment on February 26, due to the unavailability of judges as a result of the ongoing investigation of the State's Attorney's Office. The Judge indicated that the Respondent's case would have to be "rescheduled for sometime during the April Term of Court" (E. at 48). Bronstein in the meantime had asked Frank on February 7 if he would agree to a postponement of the Respondent's case, to which Frank responded that no delay would be tolerated (E. at 49).

On February 27, 1974, the Court (Turnbull, J.) assigned the date of March 11, 1974, for arraignment in the instant case and for the purpose of the setting of "a firm trial date" (E. at 51-52). A writ was issued to secure the attendance of the Respondent at said arraignment (E. at 53). Frank notified the State's Attorney's Office on March 1, that he would be unable to be present on March 11, and attempted to waive the Respondent's right to be present, asserting that "I have been pressing for a trial date in this case for some time and would appreciate it if I would be notified as soon as one is set" (E. at 54).

The date for arraignment and the setting of a firm trial date was reset for March 26 (E. at 57-58), and another writ for the Respondent was issued (E. at 59). Subsequently, the date was again changed and set for April 22 (E. at 60-61). Finally, in a letter dated April 24, 1974, Respondent's counsel were notified that an

arraignment date of April 29 had been established; that May 1 was the deadline for the filing of all pretrial motions; that on May 15, said motions would be heard; and that a trial date of June 3, 1974 had been set. Further, pursuant to the decision in *State v. Beers,* 21 Md. App. 39, 318 A.2d 825 (1974), the indictment against the Respondent was deemed to be partially defective, and, therefore, a reindictment by the Grand Jury was also scheduled for April 29 (E. at 63). The Respondent was subsequently reindicted.

The Respondent filed a motion for severance from co-defendants Pinkett and Strickland, the severance being granted at the hearing held on May 15, 1974 (E. at 111). Ruling was reserved, however, on a motion filed by the Respondent to dismiss for lack of a speedy trial (E. at 67, 111). At this hearing a June 4 trial date was established (E. at 69).

The Respondent having been severed from his co-defendants, the State elected to proceed first against the co-defendants (E. at 71). The trial of the co-defendants began on June 7. After a hearing on May 29, Respondent's motion to dismiss for lack of a speedy trial was denied. *State v. Jones, supra,* 348 A.2d at 73.

In June of 1974, Frank was indicted for perjury, and his appearance on behalf of the Respondent was stricken on June 19 (E. at 76). In a letter from the State's Attorney's Office, dated June 13, 1974, Bailey was informed that the Respondent still insisted that Bailey was his counsel (E. at 74). Since the May 25, 1973 hearing where the Respondent stated he no longer wanted Bailey to represent him, Bailey's office had had no active participation in the instant case although the appearance of the attorneys as defense counsel had never been stricken. Bailey's office was subsequently informed that a hearing would be held on June 26, 1974,

at which time it was expected that Alch would enter Bailey's appearance (despite the fact that said appearance had never been stricken) (E. at 78).

At the hearing on June 26, William Carrier, a fifth Baltimore City attorney, entered his appearance as local counsel (E. at 115). Judge Turnbull received a telegram from Alch stating that because of illness he could not be present at the hearing, that he was authorized to enter Bailey's appearance, and that the Respondent had again agreed to waive his right to a speedy trial until the requested trial date of November 18, 1974 (E. at 79). During the hearing the Respondent agreed to a delay until November 18, in order that he might have Bailey represent him. (June 26, 1974 transcript, at 9).

On October 7, 1974, Bailey was notified that the date of November 18 had been confirmed for trial (E. at 80). Bailey acknowledged on October 14, that he had been again retained by the Respondent, and that because of other trial commitments, he would be unavailable on November 18. Noting the Respondent's constant objection to delay in the trial, Bailey requested that the trial be postponed about two weeks, if the Respondent would consent (E. at 81-82). Judge Proctor informed Bailey on October 25 that no further delay in the trial would be permitted since the Respondent "has been pressing for speedy trial for sometime . . .," unless the Court received the written consent of the Respondent (E. at 84). In a letter dated October 31, the Respondent expressed to Bailey his dissatisfaction with any postponement (E. at 85), Bailey responding that, pursuant to the order of Judge Proctor, the Respondent would have to proceed with other counsel unless he filed a written consent to a delay in his trial until Bailey could finish a trial already scheduled in Michigan (E. at

86). The Respondent specifically objected to a change in the November 18 trial date in letters sent to Judges Proctor and Turnbull, and States's Attorneys Bronstein and Brannan, dated November 11 and 12 (E. at 88, 89, 90, 91). The Court indicated that these letters were not received by November 18 (E. at 100), and the court agreed to a postponement until December 2, 1974, for the start of the Respondent's trial, and so notified Bailey and the Respondent (E. at 95, 99-100).

On November 21, 1974, the Respondent, *pro se,* filed a renewal motion for a speedy trial (E. at 98). The trial, now scheduled to begin December 2, did not commence until December 4. On December 4, the Respondent was represented by Bailey and Carrier, and after a hearing on a defense motion for a change of venue, the Court ordered the case removed to the Circuit Court for Calvert County (E. at 102, 117).

On December 11, 1974, the trial began in Calvert County (E. at 118). On the next day, Judge Perry A. Bowen heard arguments on Respondent's motion to dismiss for a lack of a speedy trial (E. at 172-199). In denying Respondent's motion to dismiss, Judge Bowen stated:

> The Court:
>
> "Well gentlemen, I am bound to say that this motion gives the court a little bit of trouble. No person or court that I know of is more firmly committed to giving defendants a trial as promptly as they want it, on occasions perhaps more promptly than they want it, than this court. And we think that the right of a person who genuinely wants a prompt trial is something that ought to be carefully protected.
>
> "We have read the correspondence submitted, as well as the docket entries pertaining to this, and listen carefully to the proffers of what missing witnesses would testify to and we conclude as a

> fact that the delay in this trial was [not] a contrivance of the State to postpone the trial nor was it brought about by any lack of diligence on the part of the various prosecuting authorities to promptly dispose of the accusations against Jones. It seems to me that the docket entries and the correspondence reflect that several times this matter was set for disposition but that the defendant while asserting that he wanted to promptly go ahead with it wasn't ready for one reason or another to go ahead at that time.
>
> "Now, when you consider the fact that this defendant was involved in a series of matters which required some attention and preparation in the inevitable time lag in the assignment of those matters for disposition in courts that have heavy dockets, a substantial amount of time elapses no matter how carefully you try to avoid it.
>
> "I am inclined to think this is a close case, but on balance, I believe that the State has a right to go forward with this case and that the delay is not of such magnitude or the difficulties which it poses to the defense, which are sufficiently and clearly documented, to justify a dismissal of the charges in this case on the basis offered here.
>
> "For these reasons gentlemen, based upon the information available to the court at this time, the motion to dismiss these indictments for the lack or denial of speedy trial, both grounds, is denied." (E. 198-99).

During trial, the Respondent repeatedly disrupted the proceedings, asserting that he was not ready for trial and that his counsel was not handling the case in the manner in which he [Jones] wished (E. at 147-166). On December 13, 1974, the third day of the jury trial, Respondent was found guilty of various narcotic violations and sentenced to a term of 20 years imprisonment consecutive to the 30 year sentence Respondent had received in the federal trial of June-July, 1973.

A summary of the above chronology of events is collected in Appendix C.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS OF MARYLAND ERRED IN REVERSING RESPONDENT'S CONVICTION FOR AN ALLEGED VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL BECAUSE ITS DECISION WAS NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

While the body of law interpreting the right to speedy trial in criminal causes guaranteed by the Sixth Amendment to the United States Constitution is not overwhelming in terms of the number of decisions, this Honorable Court has clearly and recently expounded its views on this substantial federal question.

The Sixth Amendment right to speedy trial is applicable to the State of Maryland through the Fourteenth Amendment. *Klopfer v. North Carolina,* 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967).

In 1972, this Honorable Court enunciated the standards to be applied in all of the various courts in the United States in determining whether there has been a violation of an accused's right to speedy trial. The case of *Barker v. Wingo,* 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972), where a five year delay from the date of arrest to date of trial did not offend the Sixth Amendment right of speedy trial under the particular facts of the case, held:

> "The approach we accept is a balancing test in which the conduct of both the prosecution and the defendant are weighed. . . . A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Id.*)

The Court of Appeals of Maryland acknowledged this four-pronged balancing test in its opinion in the instant case. *Jones v. State,* 279 Md. 1, 367 A.2d 1, 5 (1976). Petitioner accepts the findings of fact of the Court of Appeals of Maryland but strenuously excepts to the conclusions it reaches as a matter of law based upon those facts. The appellate courts of Maryland have relied upon their interpretations of *Barker v. Wingo, supra,* as the major, virtually exclusive, authority of the issue of the Sixth Amendment right to a speedy trial. See, *e.g., Epps v. State,* 276 Md. 96, 345 A.2d 62 (1975); *Evans v. State,* 30 Md. App. 423, 352 A.2d 343 (1976).

LENGTH OF DELAY

Petitioner concedes for the purposes of this Petition that the two year and five month period separating Respondent's arrest and trial, while by no means extraordinary given the peculiar and complicated circumstances surrounding the case, does "trigger" the inquiry into the other factors enumerated above. *U.S. v. Ewell,* 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966); *Smith v. State,* 276 Md. 521, 528, 350 A.2d 628, 633 (1976). It can be truly said that the unprecedented publicity and attention generated by Respondent's trials and the inextricably intertwined spin-off investigations and prosecutions of some of the prosecutors and defense counsel involved in this case has never been paralleled in Maryland judicial history. It is the seemingly ordinary analysis of the extraordinary events of the instant case which prompts this Petition for a Writ of Certiorari.

REASONS FOR THE DELAY

The Court of Appeals of Maryland concluded as a matter of fact, that the 29 month period in the case at bar should be divided into three segments:

> "(1) from July 12, 1972, the date of Jones' arrest, to July 21, 1973, the end of his trial in federal court on narcotics charges
>
> (2) from July 21, 1973, to June 26, 1974, the day Jones waived his right to a speedy trial so that attorney Bailey could represent him; and
>
> (3) from June 26, 1974, to December 11, 1974, the date on which Jones' trial finally commenced." *Jones v. State, supra,* 367 A.2d at 6.

The delay of the first period of approximately twelve months and the third period of some six months was found by the Court not to be attributable to the State. That eighteen months of delay was due to the Respondent's actions. According to the Court of Appeals, only the middle period of eleven months was attributable "substantially, if not entirely to the State's dilatoriness." *Jones v. State, supra.*

In *Barker v. Wingo, supra,* 407 U.S. at 531; 92 S. Ct. at 2192, criteria were established for gauging the weight to be assigned to the various reasons which a state relies upon to justify the delay in bringing an accused to trial:

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally valid reason, such as a missing witness, should serve to justify appropriate delay."

The Court of Appeals of Maryland held that the eleven month period following Jones' conviction in federal court was due to "dilatoriness" on the part of the State. At the outset, the word dilatory as a legal term is defined as "tending or intended to cause delay or to gain time or to put off a decision." *Black's Law Dictionary* (Revised 4th Ed. 1968). Thus, such a delay would constitute a deliberate attempt to hamper the defense.

From a review of the nearly constant chain of events between Respondent's arrest and trial, it is clear that the State did not engage in a "purposeful or oppressive" attempt to delay the case. *Pollard v. U.S.,* 352 U.S. 354, 361, 77 S. Ct. 481, 486 (1957). The Court of Appeals of Maryland has applied excessive "weight" in the balancing test to the period of delay attributable to the State, since it equates the delay with an intentional manouevre to put off a decision on the case. It has failed to recognize that the essential ingredient of the constitutional right to a speedy trial is "orderly expedition not mere speed." *U.S. v. Ewell, supra,* 383 U.S. at 120.

Petitioner submits that, at the very worst, the eleven month delay was attributable to the more neutral reasons of negligence or overcrowded court calendars. *Strunk v. U.S.,* 412 U.S. 434, 436, 93 S. Ct. 2260, 2262, 37 L. Ed. 2d 56 (1973). The State maintains that during the eleven months in question it was continuously engaged in dealing with the Respondent's numerous counsel and in trying several of the prosecutors and defense attorneys for their alleged offenses. The State should not be held responsible for the delay resulting from a congested trial docket attributable to exceptional circumstances. ABA, *Speedy Trial* § 2.3(b) (Approved Draft 1968). If, as the Court of Appeals concluded, it

was possible to use the extraordinary procedures of appointing a substitute prosecutor and judge to handle the Jones trial, the State's failure to do so was based on the good faith motive of conducting Respondent's trial in an atmosphere untainted by concomitant trials of the principals of his prosecuting or defending teams. If it was negligent to delay the trial, it was certainly not deliberate or malicious, nor was it calculated to hamper the Respondent's defense.

Therefore, it is clear that the Court of Appeals applied as a matter of law too much weight to the eleven month delay attributable to the State, while totally failing to counterbalance the deliberate delays of twelve and six months by Jones. That constitutes an important and damaging misapplication of the law declared in the decisions of this Honorable Court and most severely injured the citizens of the State of Maryland in their effort to bring a major crime figure to justice.

This Honorable Court explained in *Barker v. Wingo, supra,* that some reasons, such as a missing witness, will validly excuse a period of delay, and not affect the balance in any manner. The Petitioner asserts that the State's efforts to try the prosecutors and defense attorneys tainted by alleged corruption prior to the trial of Jones was another example of a valid reason which would entirely justify the "crucial" delay of eleven months. Were this Honorable Court to agree with Petitioner, the State could be held accountable for virtually none of the delay.

Respondent, Jones, was unquestionably linked by the press to the dealings of the indicted defense attorney's and prosecutors in the Office of the State's Attorney for Baltimore County whose duty it was to bring Jones to trial. *Jones v. State, supra,* 367 A.2d at 7-8. Since the credibility of both the public officials and the defense

attorneys retained by Jones naturally would have affected a jury, who would be well aware of the allegations of corruption prior to trial, it was essential that the State take all necessary steps to remove the cloud of corruption unfairly surrounding *Respondent's* trial before the issues were submitted to a jury of his peers. It should be noted that the sensational publicity surrounding all facets of Jones' trial is documented in the record and even precipitated the mistrial and change of venue on December 4, 1974 (Transcript of Dec. 5, 1974, Baltimore County Circuit Court at 179, 187-94).

ASSERTION OF THE RIGHT

It is not disputed that Respondent filed *pro forma* motions requesting a speedy trial through his ever changing body of defense counsel on January 2, 1973, November 14, 1973, and November 21, 1974. There is mention in portions of the correspondence and transcripts of court hearings to the same effect. Yet, upon closer examination, it is clear each demand was part of a well-orchestrated grand design to obtain dismissal of the indictments for want of a speedy trial. The manipulation of the courts and prosecutors by Respondent is obvious. The first formal motion was filed after Jones had signed the agreement (E. 14, 15) assigning the order of trials he would receive. Further, it was made during the course of the one year period of delay attributable to Jones' own actions, according to the opinion of the Court of Appeals.

The second formal motion was filed by attorney Robert Frank on November 14, 1973. This occurred after the State had been informed on April 5, 1973 by the law offices of F. Lee Bailey that defendant was waiving his right to a speedy trial "until such time as you are notified to the contrary." Bailey's appearance in the

case was never stricken even though Jones stated in court on May 25, 1973 that he desired attorney Stephen Miles as his sole counsel. Under Maryland law, the State and the trial court were not incorrect if they did not accept Respondent's remarks as striking Bailey's appearance:

> "Except [for reasons not pertinent here], in a criminal proceeding the appearance of an attorney for the defendant may be withdrawn only with leave of court after such notice to the accused and to the State's Attorney as the court may prescribe and upon such conditions as justice may require." Maryland Rules of Procedure, Rule 751(a).

Therefore, it was not unreasonable for the State to assume, in the absence of further communication from Bailey retracting either his appearance in the case or the waiver of right to speedy trial, that Respondent was not in fact seriously pressing for an immediate trial. The confusion surrounding the asserting and waiving of the right to speedy trial was geared to help the Respondent because he only asserted the right when convenient and withdrew from that position as scheduled trial dates neared.

The third motion for speedy trial on November 14, 1974 is not a convincing assertion for it came after his right had again been waived on June 26, 1974 in order to permit F. Lee Bailey to handle the defense. Bailey was responsible for the delay during November 1974. Trial did commence a bare two weeks later in Baltimore County Circuit Court on December 4, 1974. After the mistrial and change of venue requested by Jones, trial began again in the Circuit Court for Calvert County seven days later.

While it is true, as the Court of Appeals mentioned in the *Jones v. State, supra,* 367 A.2d at 19, that repeated

demands for a speedy trial demand strong evidentiary weight, the situation at bar contradicts the sincerity of those demands. The record reflects a situation closely akin to the facts in *Barker v. Wingo, supra,* at 407 U.S. 536, 92 S. Ct. at 2194, where this Honorable Court discounted a "*pro forma* motion" which was contrary to defendant's subsequent conduct.

This Honorable Court, after a difficult and sensitive balancing test, did not find a violation of *Barker*'s right to speedy trial even though five years passed between his arrest and trial and a full 20 months after the motion for speedy trial was filed. In assessing Barker's conduct, this Court noted:

> "Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced and thereby obtain a dismissal of the charges, he definitely did not want to be tried."

Barker v. Wingo, supra, 407 U.S. at 535; 92 S. Ct. at 2194. In *Barker,* counsel conceded this fact in oral argument but failure of counsel in the instant case to do so before the Court of Appeals of Maryland is not dispositive of the issue. Respondent's conduct at trial demonstrates beyond doubt that he "definitely did not want to be tried." His actions and verbal outbursts were so dilatory and disruptive that the true nature of the sham demand for speedy trial became clear. When all else had failed in gaining Jones an additional postponement on the morning of trial he said in desperation "I'd like a recess so I can think of something else. . . ." (E. 150). Subsequent boisterous outbursts resulted in the trial judge ordering that Respondent be bound, then gagged and finally removed from the court room.

Therefore, it is again asserted that the Maryland Court of Appeals misapplied the law declared by the Supreme Court of the United States by according

excessive weight to the mock requests for speedy trial by Respondent. The Court of Appeals erred as a matter of law.

PREJUDICE

As might be expected in a case where the defendant is the cause of the majority of the delay prior to his trial (18 months), Respondent has suffered virtually no prejudice to his defense. The opinion of the Court of Appeals of Maryland could not find as a matter of fact *actual* prejudice. *Jones v. State, supra,* at 11-12. The "presumed" prejudice recognized in *Moore v. Arizona,* 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973) and *Strunk v. U.S.,* 412 U.S. 434, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973) is minimal.

The case of *Barker v. Wingo, supra,* again provides clear authority to assigning the proper weight to the prejudice factor in the overall balancing test:

> "A fourth factor is prejudice to the defendant. . . . This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." (omitting citations contained in footnote 33). *Id.* at 407 U.S. 532, 92 S. Ct. 2193.

The Court of Appeals of Maryland failed to recognize any alleged prejudice due to the impairment of the defense caused by the delay. Thus this most important factor, as this Honorable Court has stated, is absent.

With respect to oppressive pretrial incarceration, it is noted that the Respondent spent virtually no time in jail as a result of the *instant* charges. He escaped from custody on the day following his arrest. After his voluntary surrender on the advice of his counsel, F. Lee Bailey, he was released on bail. The periods of

incarceration were due to the imposition of a thirteen month sentence for an unrelated escape conviction and a thirty year sentence for unrelated federal narcotics violations.

The third factor concerns the anxiety an accused may feel because of his uncertain future and the public obloquy to which he will be subjected due to the untried criminal allegations. It is submitted, again, that these factors deserved very little weight.

Consideration of public obloquy became unimportant upon Respondent's conviction in the United States District Court, District of Maryland. The offenses which led to the imposition of a thirty year sentence occurred during the same general time period as the instant offenses. So close, were they in fact, that Respondent sought to avoid trial on the instant offenses on a theory of double jeopardy or collateral estoppel.

While that attack was doomed to failure, the proximity of the offenses does substantiate the claim by Petitioner that Respondent's reputation was at its ebb upon the federal conviction and could not have suffered more awaiting the outcome of the present indictments. Through the benefit of 20-20 hindsight, it is noted that whatever degree of public obloquy was directed at Respondent was in fact deserved because the charges were sustained by a jury.

No prejudice from missed opportunities for rehabilitation programs or parole due to the untried indictments in the instant case has been alleged below. Respondent had barely begun to serve the thirty year term. The interruption of family ties and employment, from which prejudice may be presumed sometimes, is absent in this case because of the imposition of the lengthy federal prison sentence.

The Court of Appeals of Maryland relied on an observation made by this Honorable Court in *Strunk v. U.S., supra,* 412 U.S. at 439, 93 S. Ct. at 2263 to the effect that even a prisoner serving prior sentences can feel anxious about his future if denied the right to a speedy trial. *Jones v. State, supra,* 367 A.2d at 12. The holding in *Strunk* was far narrower. *Assuming* the validity of the claimed denial of right to speedy trial, this Honorable Court held in *Strunk* that the only remedy was dismissal of the indictment. The Court questioned the lack of a cross-petition to examine the validity of the lower court's finding of the denial of Strunk's right to a speedy trial, implying that the merits of that defendant's claim were less than persuasive. By dicta the court noted at 412 U.S. 436, 93 S. Ct. 2262 that the large part of a pretrial delay was due to Strunk's actions, that no actual prejudice was present and that the unintentional delay due to the insufficient staff of prosecutors was to be weighed less heavily than an intentional delay. The court seems to suggest that if it had been asked to review the issue, it would have found no violation of the Sixth Amendment. The facts in *Strunk* are analogous in the instant case to that extent.

Therefore, the Court of Appeals of Maryland, again as a matter of law, erred in assigning prejudice to Respondent as a part of the balancing test. That error worked unfairly to the advantage of Respondent and served to frustrate the rights of the citizens of Maryland to enforce its criminal laws.

BALANCING

To summarize the factual conclusions upon which the Court of Appeals of Maryland based its decision: (1) of the total length of the delay, the Respondent was responsible for the larger part, almost two-thirds. (2)

The reason for the eleven month delay attributable to the State was due to a good faith effort to prosecute the Respondent in an atmosphere untainted by allegations of official corruption in the Office of the State's Attorney's Office and due to a believed lack of prosecutors and judges because of that same corruption investigation. No hint of purposeful or intentional delay to harass the Respondent or to impair his defense is present. (3) The Respondent did assert his right to a speedy trial, although there was ample evidence that the Respondent's *pro forma* motions smacked of opportunism. (4) No actual prejudice resulted from the delay and minimal presumed prejudice was shown.

Based upon those facts, the balance should have obviously tipped in favor of the State's right to bring a suspected felon to justice. The only remedy available for an abridgement of the right to a speedy trial is dismissal of the charge. This has been described as an "unsatisfactorily severe remedy . . . because it means that a defendant who may be guilty of a serious crime will go free. . . ." *Barker v. Wingo, supra,* 407 U.S. at 522. This court also acknowledged the "societal interest in trying people accused of crime rather than granting them immunization. . . ." *U.S. v. Ewell, supra,* 383 U.S. at 121. On balance, the State should not have been faulted and made to suffer the ultimate sanction of dismissal of the charges when it was attempting to clean its own house of corruption and to deal with the ever-changing strategy of the Respondent on bringing this case to trial. However, the Court of Appeals of Maryland came to the opposite conclusion, contrary to the decisions of this Honorable Court. The issue in the instant case does not depend on a mere fact-finding exercise. The Petitioner submits that review by this Honorable Court is appropriate and, indeed, necessary since the law as delineated in *Barker v. Wingo, supra,*

was incorrectly applied by the highest court in the Maryland judiciary.

NO ADEQUATE STATE BASIS

The Constitution of Maryland provides "That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury. . . ." Maryland Constitution, Article 21. However, this does not provide an adequate state basis to support the departure of the Maryland courts from the decisions of the United States Supreme Court, nor does it prevent this Honorable Court from undertaking a review of the State decision. *See, Fay v. Noia,* 372 U.S. 391, 428, 83 S. Ct. 822, 843, 9 L. Ed. 2d 837 (1963).

Firstly, the Court of Appeals of Maryland nowhere relied upon Article 21 of the Maryland Constitution in its opinion in the instant case. Further, the Maryland right to a speedy trial has been interpreted to guarantee nothing more nor less than the concomitant Sixth Amendment right under the Constitution of the United States. As the case of *Smith v. State,* 276 Md. 521, 526, 350 A.2d 628 (1976), suggests, if anything, Maryland's constitutional right to speedy trial may excuse a longer delay in bringing an accused to trial than the federal right. *But see Smith v. State, supra,* 350 A.2d at 536 (concurring opinion of O'Donnell, J.).

Unquestionably, the courts of Maryland look to the *Barker* decision, with an almost biblical reverence, as the preeminent authority on speedy trial matters.

> "That case is the touchstone to which we shall return and return and return again in testing the facts at hand against its informing standards." *State v. Wilson,* ___ Md. App. ___, ___ A.2d ___ (No. 1366, Sept. Term, 1975, filed 3-8-77).

Yet a review of all the many opinions by Maryland appellate courts (collected in *State v. Wilson, supra,* at

note 4), though ostensibly being grounded upon the hallowed principles of *Barker v. Wingo, supra,* reveals a crazy-quilt of decisions which deprive both criminal defendants and the citizens of the state of any certainty in predicting when a conviction will be vacated for failure to provide a speedy trial. *Compare Lee v. State,* 32 Md. App. 671, 363 A.2d 542 (1976, *cert. denied* 12-6-76), where crucial eleven month delay by State did not violate right to speedy trial, *with Pyle v. State,* 34 Md. App. 60, 366 A.2d 90 (1976), where eleven month delay by State in routine case resulted in dismissal of charges for lack of speedy trial. *Compare Jones v. State, supra,* 367 A.2d at 11-12 *with State v. Wilson, supra,* on the treatment of presumed prejudice. The State of Maryland desperately needs additional guidance from this Honorable Court on the issue of constitutional right to speedy trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Court of Appeals of Maryland

No. 3

John Edward Jones
v.
State of Maryland.

Dec. 14, 1976.

Defendant was convicted in the Circuit Court, Calvert County, Perry G. Bowen, Jr., J., of conspiracy to violate narcotics laws, and defendant appealed. The Court of Special Appeals, 29 Md. App. 182, 348 A.2d 55, affirmed, and certiorari was granted. The Court of Appeals, Digges, J., held that where defendant was not brought to trial until approximately 29 months after his initial arrest, where State was responsible for 11 months of such delay, where defendant repeatedly asserted his right to a speedy trial, and where prejudice resulted from delay, defendant was denied his Sixth Amendment right to a speedy trial.

Reversed and remanded with directions.

Murphy, C. J., filed a dissenting opinion in which Smith, J., concurred.

F. Lee Bailey, Boston, Mass. (Joel D. Fedder, Baltimore, on the brief), for appellant.

Albert Gallatin Warfield, III and John A. Austin, Asst. Attys. Gen. (Francis B. Burch, Atty. Gen., and Clarence W. Sharp, Asst. Atty. Gen., Baltimore, on the brief), for appellee.

Argued before MURPHY, C. J., and SINGLEY, SMITH, DIGGES, LEVINE and ELDRIDGE, JJ., and MATTHEW S. EVANS, Special Judge.

DIGGES, Judge.

The issue which we conclude to be dispositive of this criminal cause is whether the petitioner's right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was denied. Because we determine that this right was violated, the conviction must be reversed and the indictment dismissed.

The petitioner, John Edward (Liddy) Jones, following his arrest on July 12, 1972, was charged in Baltimore County with violations of, and with conspiracy to violate, Maryland's narcotics laws. Approximately two and one half years later, in December of 1974, upon removal trial began in the Circuit Court for Calvert County before Judge Perry G. Bowen, Jr., and a jury. At that trial Jones was found guilty on four counts of the indictment and was sentenced to a 20-year term of imprisonment to commence following the expiration of a federal term he is presently serving. The petitioner noted a timely appeal to the Court of Special Appeals, where a three-judge panel upheld his conviction, with Judge Davidson dissenting. *Jones v. State,* 29 Md. App. 182, 348 A.2d 55 (1975). We granted certiorari to review that court's decision.[1]

In the resolution of the speedy trial issue in this case we, of course, must carefully scrutinize all occurrences between Jones' arrest and trial. For the sake of clarity and brevity, however, we will present only a skeletal outline of facts at this point and recount in more detail, in our discussion of the reasons for the delay and the

[1] Our grant of certiorari was limited to two issues: (1) whether the petitioner had been denied his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and (2) whether Article XV, Section 5 of the Constitution of Maryland, which establishes the jury as judge of the law as well as of fact in criminal causes, in violative of federal due process requirements. In view of our determination with regard to the speedy trial question, it is unnecessary to discuss the second issue.

defendant's assertion of the right, those events which the parties allege either directly or collaterally contributed to the two and one half year period. By way of a one sentence overview, suffice it to say that Jones' trial on the narcotics charges could well have taken place as scheduled on December 15, 1972, June 25, 1973, February 26, 1974, or June 26, 1974, but for various reasons it did not commence until December 11, 1974.

On the day following his July 12th arrest, Jones escaped from the Baltimore County jail; however, within several days he surrendered to local authorities and was indicted for the several narcotics offenses as well as for the escape. The State elected, over Jones' objections, to proceed on the escape indictment first, and trial was set for November 29, 1972, with the narcotics case to be tried no later than December 15th of that year. However, neither trial took place as contemplated because two days prior to the scheduled trial on the escape charge, Jones and the State entered into a written agreement which provided that the escape case would be tried on January 8, 1973 (or as soon thereafter as the docket would permit), and would be completed prior to commencement of the trial on the narcotics charges. Along with a number of preliminary motions, Jones filed his first demand for a speedy trial of the narcotics cause on January 2, 1973. On January 11, he entered a guilty plea to the escape charge and was sentenced to a prison term of 13 months. On March 2, 1973, the Deputy State's Attorney for Baltimore County wrote to the petitioner's attorneys, explaining that while the State had taken no action to press the narcotics case to a conclusion during the previous two months because it was not sure Jones would attend the trial (claiming his whereabouts were then unknown to it), the State now desired to proceed as quickly as possible. And in mid-March, the parties agreed to a March 30 hearing on several pending preliminary motions, which took place as scheduled. A little more than one month later, on May 3, the petitioner was indicted on charges of federal narcotics violations. Although the State should have had scheduling priority in light of the fact that a June 25 trial date was set at a hearing in late May (when no trial date in federal court apparently had been determined), Jones' trial in the

federal district court nevertheless began on June 18 and lasted through July 21, thus forcing a further postponement of his state trial.[2]

Very little activity appears to have transpired over the course of the next several months in connection with the disposition of this case. In September the state's attorney's office contacted Jones' lawyers by letter with regard to a motion for discovery and inspection, and on November 14, the petitioner filed his second motion for a speedy trial. Subsequently, on the day after Christmas, Assistant State's Attorney Ruppersberger and Jones' attorney orally agreed to a February 26, 1974, trial date and following several exchanges of letters in January, this date became firm. On the 8th of February, however, the case was removed from the scheduled assignment by Circuit Administrative Judge Proctor, who indicated that no judges were available to conduct the trial and that it would have to be rescheduled for some time during the April term of court. Jones' arraignment was similarly postponed on a number of occasions in the spring of that year, during which time numerous motions were filed, including Jones' third speedy trial assertion and a request that his trial be severed from that of his three co-defendants. Following the grant of the petitioner's severance motion, the State elected to proceed against Jones' co-defendant first, but finally at a June 13 hearing, the case against Jones was set to go forward on the 26th of that month.

Perhaps he would have been tried in June, but at a hearing on the scheduled trial date, Jones agreed to waive his right to a speedy trial until November 18 so that attorney F. Lee Bailey, who was then unavailable due to a trial conflict, could represent him. An additional postponement, requested by Bailey, caused a further delay until early December. The trial finally began in the Circuit Court for Baltimore County on the 4th; however, the next day Judge Proctor declared a mistrial pursuant to Jones' request and removed the case to Calvert County where trial began on December 11. At trial, Jones again raised the speedy trial issue,

[2] Jones was convicted in federal court and sentenced to a 30-year term of imprisonment which he is now serving.

this time by a motion to dismiss. The court denied the motion, and following a two day trial, Jones was convicted on four counts of the indictment.

[1] In determining whether there has been a violation of the Sixth Amendment right to a speedy trial, applicable to the states through the Fourteenth Amendment, *Klopfer v. North Carolina,* 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), we must "engage in a difficult and sensitive balancing process," *Barker v. Wingo,* 407 U.S. 514, 533, 92 S. Ct. 2182, 2193, 33 L. Ed. 2d 101 (1972), in which four factors are of primary importance: (1) length of delay, (2) reasons for the delay, (3) defendant's assertion of his right, and (4) prejudice to the defendant. *Id.* at 530, 92 S. Ct. at 2191-92; *see Erbe v. State,* 276 Md. 541, 546-47, 350 A.2d 640, 643 (1976); *Smith v. State,* 276 Md. 521, 527-28, 350 A.2d 628, 632-33 (1976); *Epps v. State,* 276 Md. 96, 104-09, 345 A.2d 62, 68-71 (1975).

(1) *Length of Delay*

[2] This Court concluded in *Epps v. State, supra,* 276 Md. at 111, 345 A.2d at 72, that a one-year, 14-day interval between arrest and trial is "presumptively prejudicial," requiring us to engage in the balancing procedure outlined in *Barker. See also Smith v. State, supra,* 276 Md. at 528, 350 A.2d at 633 (16-month delay). Since the two-year, five-month interval between Jones' arrest and trial was of considerably more than twice the duration of that in *Epps,* we are bound to inquire into the other factors included in the balancing process.

(2) *Reasons for the Delay*

[3-5] As this Court pointed out in *Smith v. State, supra,* 276 Md. at 528, 350 A.2d at 633, different reasons for delay in prosecuting a defendant should be assigned different weights. In this regard a continuum exists whereby a deliberate attempt to hamper the defense would be weighed most heavily against the State, a prolongation due to the negligence of the State would be weighed less heavily against it, a delay caused by a missing witness might be a neutral reason chargeable to neither party, and a delay attributable solely to the defendant himself would not be used to support the

conclusion that he was denied a speedy trial. *Id.* at 529, 350 A.2d at 633. While we must scrutinize the entire interval between arrest and trial, and attempt to ascribe reasons for particular delays, it is not possible or even desirable to do so with mathematical precision; we will not count up the time chargeable to the State, that chargeable to the defendant, and those delays attributable to neutral reasons, multiply the number of days or months by a parameter assigned for each particular reason and then dismiss the indictment if the defendant ends up with the lower tally. Instead, delays must be examined in the context in which they arise and therefore a lengthy uninterrupted period chargeable to one side will generally be of greater consequence than an identical number of days accumulating in a piecemeal fashion over a long span of time. Finally, we must always bear in mind that the State has the duty to bring the defendant to trial, *Barker v. Wingo, supra,* 407 U.S. at 527, 92 S. Ct. at 2190, and thus lengthy delays by the State, particularly in the face of a defendant's assertion of his right, are especially significant.

Turning to the present case, we conclude that the reasons for the delay can best be analyzed by dividing the 29-month span into three periods: (1) from July 12, 1972, the date of Jones' arrest, to July 21, 1973, the end of his trial in federal court on narcotics charges; (2) from July 21, 1973, to June 26th of the following year, the day Jones waived his right to a speedy trial so that attorney Bailey could represent him; and (3) from June 26, 1974, to December 11, 1974, the date on which Jones' trial finally commenced. As discussed below, we determine that whereas the initial delay of one year and the final delay of six months were largely the result of the defendant's own actions, the 11-month delay between July 1973 and June 1974 was attributable substantially, if not entirely, to the State's dilatoriness.

[6, 7] Despite the petitioner's contentions to the contrary, the initial year's delay was not the result of conduct which may be charged to the State. It is clear that Jones either initiated or acquiesced in the postponement of his trial for substantial periods of time prior to July 1973 — by written agreement, he consented to the January 8, 1973 scheduling of his trial

on escape charges, with that trial to be completed prior to the commencement of trial on the narcotics indictment in the present case; he explicitly waived his right to a speedy trial from April 5 to May 25;[3] and, through the apparent failure of his attorneys to inform the federal district court that a June 25 trial date in the state case had been set, he allowed a conflict between the two trials to result, causing a postponement of the state trial until after the completion of the federal case in July. Although the State may have been accountable for other short periods during this interval, had the petitioner been brought to trial promptly after the conclusion of his federal trial, this Court would have had little difficulty in rejecting a claim that he was denied a speedy trial.

[8] We now turn our attention to that interval of 11 months following Jones' federal trial, a delay which we consider to be crucial in this case. As mentioned in our summary of the facts, little occurred during this period in connection with the disposition of the narcotics charges pending against Jones. The petitioner argues, as might be expected, that the delay between July 1973 and June 1974 was the result of inexcusable foot-dragging on the part of the prosecution. The State, while admitting at oral argument before this Court that this interval is "the most difficult to specifically point out the reasons for," nonetheless attempts to justify its inaction in two basic ways: first, that during this time there were ongoing investigations, resultant indictments, and trials which had originated in allegations of corruption related to Jones' prosecution, and second,

[3] On April 5, Bailey informed the state's attorney's office that, due to other commitments, he wanted the trial postponed and that the defense was waiving its right to a speedy trial until further notice. However, at a May 25th hearing before Judge Proctor to determine, among other things, who was representing Jones at that time, he emphatically stated that Bailey no longer represented him and that his sole attorney was Stephen Miles. We conclude, therefore, that the waiver by Bailey must be deemed to have been explicitly terminated as of the date of that hearing. In this respect, Jones testified at trial that he had discharged Bailey because he "didn't want him to keep holding [the] case up."

that during this interval Jones' attorneys were actively involved in plea negotiations on his behalf. We are unpersuaded, however, that these rationalizations in any way justify the delay amounting to nearly *one year*, particularly since a year had already passed and Jones had asserted his speedy trial right both prior to and during this 11-month interval.

It is true that in November of 1972, four months after Jones' arrest, Governor Mandel issued a directive to the Attorney General to investigate allegations of official corruption in connection with Jones' prosecution and escape from the Baltimore County jail. It is equally true that this investigation eventually led to prosecution of two attorneys who represented Jones as well as to a collateral probe of misfeasance in the office of the State's Attorney for Baltimore County. We do not believe, however, that these activities by the State in any way served to excuse the delay between July 1973 and June 1974 or in any way constituted "a cloud of corruption," *Jones v. State, supra,* 29 Md. App. at 196, 348 A.2d at 64, over the *petitioner's* narcotics case which mandated the postponement of Jones' trial until all taints of official misconduct were eradicated.

Although one of Jones' attorneys, Robert Frank, was under investigation during various stages of the prosecution of the petitioner, we discern no reason why this should have interfered with the orderly disposition of the narcotics charges against Jones. Frank was tried in January and February of 1973 on charges of attempting to bribe the Deputy State's Attorney for Baltimore County and, though acquitted, admitted in the course of that trial the payment of $3,000 to influence that public official in actions unrelated to Jones; however, this proceeding occurred during the interval which we have already ascribed to the defendant and at a time when Frank was not even representing Jones. Although disciplinary proceedings were pending against Frank during the interval presently under consideration, and he ultimately was disbarred in the autumn of 1974, *Maryland State Bar Ass'n v. Frank,* 272 Md. 528, 325 A.2d 718 (1974), we do not perceive how this can justify the State's failure to

bring Frank's client to trial.[4] We agree, moreover, with Judge Davidson's analysis in her dissenting opinion in the Court of Special Appeals that "if the State's reason for delaying Jones' trial was, in fact, to await the outcome of the disbarment proceedings against Frank, it should have at least expressly so notified him, so that he might choose other counsel and obtain a speedy trial." 29 Md. App. at 222, 348 A.2d at 78.

[9] The State also attempts to justify the delay from July 1973 to the following February in Jones' trial as being a direct result of the investigation of Stephen Miles, another of Jones' lawyers, and the prosecution of officials in the state's attorney's office on charges wholly unrelated to the petitioner. On July 20, 1973, Miles, who represented Jones at that time, was indicted on charges which included conspiracy with the petitioner (named by the State as an unindicted co-conspirator) to bribe the Deputy State's Attorney. His trial on those charges commenced in the latter part of February 1974 and he was acquitted on March 11 of that year. During this period, the prosecution of Baltimore County State's Attorney Samuel Green and an investigator, Louis Irvin, also took place. In its brief the State contends that "the ultimate responsibility must lie with Petitioner himself for this period of time since his own counsel precipitated the investigations and indictments through their own activities." We do not agree. Quite to the contrary, for several reasons we view the State's explanation of the delay as nothing more than a concocted diaphanous smoke screen. The record discloses that on August 22, 1973, a mere four weeks after the termination of Jones' federal trial, an Assistant Attorney General sent a letter, the body of which we quote in its entirety, to Charles Ruppers-

[4] We note, as did Judge Davidson in her dissenting opinion in the Court of Special Appeals, 29 Md. App. at 222 n. 7, 348 A.2d at 78, that at the time of the disciplinary proceedings against Frank, the Maryland Rules did not provide for the suspension of attorneys pending final decision on the charges by this Court. *See* Rule BV8. Even under the presently applicable rules, only those attorneys convicted (and Frank was not) of a crime involving moral turpitude may be suspended from the practice of law pending the disposition of the disciplinary proceedings. *See* Rule BV16.

berger, Assistant State's Attorney for Baltimore County (with a copy to Judge Proctor), which indicates expressly or implicitly that Jones' trial and the Attorney General's investigation would not seriously interfere with one another so as to prevent either from proceeding to a conclusion:

> "The purpose of this letter is to confirm the oral response of this office to your question 'would the trial of John E. (Liddy) Jones by the State's Attorney's Office of Baltimore County interfere with the investigation currently being conducted by the Attorney General's office?' *I want to again assure you that the trial of Mr. Jones would not interfere with the aforesaid investigation.*
>
> "You should be aware, however, inasmuch as Stephen Miles, Esquire may be trial counsel for Mr. Jones, that the case of *State v. Miles* is scheduled for trial beginning November 12, 1973, and that Mr. Miles may be called as a witness in the case of *State v. Irvin,* scheduled to begin October 9, 1973 and *State v. Green,* scheduled to begin October 23, 1973." (Emphasis added.)

Moreover, Miles did not even represent Jones after September 6, 1973, and therefore Miles' own trial or his appearance at the trial of Green or Irvin was no longer of any consequence, if it ever could have justified a delay in the Jones trial, after the beginning of September. Finally, Jones at all times had an attorney ready to go to trial, and if the complement of prosecutors in Baltimore County was depleted, as the State seems to suggest, by allegations of corruption in the state's attorney's office, it was incumbent upon the State to utilize existing procedures for the appointment of another prosecutor.[5] That simple expedient would have removed what the State now asserts was its fear

[5] As we recently pointed out in *Sinclair v. State,* 278 Md. 243, 246 n. 1, 363 A.2d 468, 470 (1976), both the Constitution and Code of Maryland provide remedies for such a contingency as existed here. *See* Md. Const., Art. V, § 3 (permitting attorney general to prosecute upon direction of governor or General Assembly); Code (1974), Courts and Judicial Proceedings Article, § 2-102(a) (allowing court to appoint temporary counsel for the State.)

that the trial would be conducted under a "cloud of corruption" and would have avoided the denial of the petitioner's speedy trial right ultimately resulting from the State's failure to bring Jones to trial promptly.

[10] The delay from the end of February to June 26 also must be weighted against the State. On February 8, Judge Proctor in the Circuit Court for Baltimore County postponed the February 26 trial date to "sometime during the April Term of Court," due to the unavailability of judges resulting from the trial of cases in the aftermath of the investigation of the state's attorney's office. We conclude, however, that delay due to the lack of a judge to preside at a defendant's trial is delay chargeable to the State. *See Smith v. State, supra,* 276 Md. at 529, 350 A.2d at 633. The State's suggestion, therefore, that the delay from February to at least sometime in April should not be attributed to it is wholly without merit.[6] And with respect to the delay from May to mid-June, we need only note that the State's brief concedes that its election to proceed against Jones' co-defendants first requires that period to be charged to it. Arguably, only the delay during April can possibly be classified as neutral; however, we conclude that it is more likely than not chargeable to the State since the record does not reflect any reason for the delay at this time, and the earliest possible trial date in any event was sometime in the April term, which did not even begin that year until the 8th of that month.

[11] In a desperate effort to extricate itself from this otherwise inexplicable situation, the State secondly offers the fact that some plea negotiations were conducted during a short portion of this 11-month period. The only references in the record to such negotiations consist of the January 9, 1974 letter from Benjamin Bronstein, the Deputy State's Attorney, to Frank, in which Bronstein noted his recollection of conversations which had led him to believe that Frank

[6] We note that even though the judges of the Third Judicial Circuit (which includes Baltimore and Harford Counties) may have been occupied with the trial of other cases in the winter of 1974, a mechanism exists to ameliorate just such a situation. *See* Md. Const., Art. IV, § 18A.

was "not necessarily concerned with the trial of the Jones case but only in plea negotiations," and Frank's response the next day, admitting having discussed plea negotiations on a number of occasions, but asserting that any such discussion was irrelevant to his client's demand for a speedy trial. Under these circumstances, we agree with Judge Davidson that "[t]he right to negotiate for a plea need not be relinquished to avoid an inference either that a delay was caused by the accused or that a delay otherwise attributable to the State should be excused." 29 Md. App. at 225, 348 A.2d at 79. No reason appears to us why the State should not be required to provide a prompt trial, whether or not the parties are engaged in plea negotiations.

The third and final period, from June 26 to December 11, 1974, when Jones' trial commenced, to a large degree was the result of the petitioner's own actions and we need pause only momentarily to consider it. He specifically waived the right from June 26 to November 18 so that attorney Bailey could re-enter the case and represent him at trial. The final three-week period, due to a postponement by Bailey apparently without the acquiescence of Jones, at the least cannot be charged to the State.

[12-14] What we have here, thus, is an 11-month delay overwhelmingly chargeable to the State sandwiched between an earlier delay of one year and a subsequent delay of nearly six months, both of which are due to neutral reasons or to the actions of Jones. We note initially that the final six-month delay because of the unavailability of Bailey in no way serves to mitigate the failure of the State over the preceding 11 months to bring Jones to trial. Moreover, in light of our recent decision in *Smith v. State, supra,* we are compelled to conclude that the initial year's delay caused to a substantial extent by Jones himself similarly in no way excused the State from its duty to bring the defendant to trial during the crucial 11-month period, particularly in the face of Jones' repeated demands. In *Smith,* the accused was originally scheduled to be tried on rape charges some nine months after his arrest, having first been committed to a state hospital for mental examination and (three months

after his arrest) found competent to stand trial. However, just prior to the scheduled trial date, the State discovered that its chief prosecuting witness was no longer within the jurisdiction; the trial was postponed, and though the witness was located and a new date for trial was immediately sought, it was not rescheduled until a date some five months later, notwithstanding the defendant's prior demand for a speedy trial. No excuse was offered for that five-month delay, which we termed "crucial," and we concluded, as we do in respect to the 11-month delay here, that it was caused by governmental tardiness and neglect. 276 Md. at 530-31, 350 A.2d at 634-35. We said:

> "In view of the amount of time which had already elapsed, the petitioner's demand for a speedy trial and the circuit court's evident concern over the issue, the State should have made certain that the trial was promptly reset for a date in the immediate future, even if that required the rescheduling of other cases. . . . We add that when a defendant makes known his desire to be furnished his constitutionally guaranteed speedy trial, it is incumbent upon the State to provide for trial at the earliest practicable date. *Epps v. State, supra,* 276 Md. at 114-15, 345 A.2d at 74; *Jones v. State, supra,* 241 Md. [599] at 610-11, 217 A.2d 367." *Id.* at 531, 350 A.2d at 634.

In addition we observe that where a demand has been made for a speedy trial, where almost a year has elapsed, for whatever reasons, since the time of the defendant's arrest, and where any impediment to trial attributable to the accused's actions has been removed, it is incumbent upon the State to bring the accused to trial without further delay.

(3) *Defendant's Assertion of His Right*

It is not disputed that Jones' counsel and Jones himself repeatedly asserted his right to a speedy trial. Motions to that effect were filed on January 2, 1973, on November 14, 1973, and on November 21, 1974; motions to dismiss for lack of a speedy trial were filed on May 15 and November 21, 1974. Moreover, various items of correspondence between his lawyers and the State in

January and March of 1974 substantiate Jones' desire for a speedy trial. The State contends, however, that the petitioner's conduct, as reflected in his "numerous changes of counsel," and in his behavior at trial, belied his formal demands.

Although there indeed were a number of attorneys involved in this case at various times, at no point was Jones without counsel, and the matter of who represented him of record at any particular time is not complicated. In 1972, Jones had four attorneys: Stephen L. Miles (a member of the Maryland bar), whose appearance was entered on August 21, as well as F. Lee Bailey and Gerald Alch (both of Boston, Massachusetts), and Gerald Kroop (of the Maryland bar) whose appearances were entered on October 13. Miles' appearance was stricken on January 22, 1973, shortly after entry of the appearance of William H. Murphy, Jr. as local counsel. At a hearing on May 25, 1973, however, Jones stated that only Miles represented him, that he had discharged Bailey and Alch due to their unavailability at that time, see note 3 *supra,* and that he did not want either Murphy or Kroop as counsel. On June 7, 1973, Robert H. Frank (also a member of the Maryland bar at that time) entered his appearance as co-counsel with Miles; in September, however, Miles' appearance was stricken, leaving Frank as Jones' only attorney. In June of 1974, Frank's appearance was stricken and Bailey once again became Jones' attorney, this time with William W. Carrier as local counsel.

[15] The assertion that these "numerous changes of counsel" indicate that Jones did not actually desire a speedy trial is without merit. Although Bailey's and Alch's appearances had never been formally stricken, the record is clear that they had actually been discharged by Jones, and that the court and the prosecutors were so informed. Moreover, Bailey's discharge in May of 1973, and his subsequent rehiring in June of 1974, is perfectly understandable, since Bailey had been indicted in Florida in May 1973 on federal mail fraud and conspiracy charges (both later dismissed) and he was in no position to represent Jones until April 25, 1974. *See United States v. Bailey,* 399 F. Supp. 526, 528 (M.D. Fla. 1975). We fail to see how this

or any of the other attorney changes in this case can be construed to imply that the petitioner did not in fact desire a speedy trial.

Nor can we simply infer from Jones' conduct on the first day of his trial that his prior demands had been disingenuous. At trial on December 11, Jones expressed his dissatisfaction with Bailey's representation of him and stated that because of this he was not prepared to begin the trial on that day. We do not conclude, however, that this isolated request in any way detracted from the sincerity of Jones' previous efforts, over the course of two and one half years, to obtain a prompt trial. The rationale set forth in Judge Davidson's dissent, 29 Md. App. at 230-31, 348 A.2d at 82-83, involving the strained relations which had developed between Jones and his attorney as a result of disagreement over the conduct of his defense, is certainly a plausible explanation. Moreover, *Barker v. Wingo, supra,* 407 U.S. at 531, 92 S. Ct. at 2192, requires us to give repeated demands for a speedy trial "strong evidentiary weight," and we believe that those demands should not be discounted unless the evidence on that point is very clear, as it was in *Barker.* There, counsel *admitted* at oral argument that his client probably did not want to be tried; for well over three years (of a total five-year delay) the defendant had made no assertion whatever of this right; and even after his first request, he again agreed to additional continuances. *Id.* at 534-36, 92 S. Ct. at 2194-95. Jones, unlike Barker, repeatedly asserted his desire for a speedy trial from the outset, and no concession has ever been made that the petitioner here did not in fact desire a speedy trial. The evidence from which we are asked to conclude that Jones did not want a speedy trial is tenuous; consequently, his repeated demands must be weighted in his favor.

(4) *Prejudice to the Defendant*

[16] Under Supreme Court guidelines, an affirmative demonstration of prejudice is not necessary to prove that a defendant was denied his constitutional right to a speedy trial. *Moore v. Arizona,* 414 U.S. 25, 26, 94 S. Ct. 188, 189, 38 L. Ed. 2d 183 (1973) (per curiam). If a

defendant can show prejudice, of course, he has a stronger case for dismissal.

[17] Jones asserts that he was prejudiced at trial because exclupatory testimony from three witnesses was not available to him. The record indicates that co-defendant Kevin Darby, one of the prospective witnesses, was killed in May of 1973, and that prior to that time he was incarcerated in a mental institution and was not expected to attend his own trial. Since we have indicated that, had Jones been brought to trial promptly after the end of his federal trial in July 1973, denial of his speedy trial right probably would not have occurred, Jones cannot rely on prejudice from Darby's death.[7] Jones testified that Joseph Perry, another prospective witness, died some time in 1973, and in final argument on the issue at trial, his attorney mentioned the disappearance of a third witness, Andrew Strickland, who had originally been another of Jones' co-defendants. Since it is not clear from the record what testimony Jones claims Strickland might have offered, and since it may be that Perry, as well as Darby, had died before the critical period of delay occurred, we cannot determine whether Jones suffered an actual impairment of his defense.

[18-20] We do note, however, that factors of lesser importance are also to be considered in assessing prejudice:

> "The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than or consecutive to, the one he is presently serving — uncertainties that a prompt trial removes." *Strunk v. United States,* 412 U.S. 434, 439, 93 S. Ct. 2260, 2263, 37 L. Ed. 2d 56 (1973).

[7] We note also that, in his written agreement with the State of November 27, 1972, relating to the trial of his escape case, Jones waived any right to future postponement of his trials on either the escape or the narcotics charges on the ground of the unavailability of Kevin Darby as a witness.

Jones was forced to endure the prospect of undergoing his trial in state court for well over a year following his conviction on federal charges in July of 1973, and therefore may have suffered needlessly for 11 months due to the State's inactivity in disposing of his case promptly. We also consider, as we must in every criminal cause, that, although the right to a speedy trial is a protection for the accused, broader societal interests are also effectuated by the enforcement of the guarantee. *See Barker v. Wingo, supra,* 407 U.S. at 519-21, 92 S. Ct. at 2186-87; *Dickey v. Florida,* 398 U.S. 30, 42, 90 S. Ct. 1564, 1571, 26 L. Ed. 2d 26 (1970) (Brennan, J., concurring); *Smith v. State, supra,* 276 Md. at 533-34, 350 A.2d at 636.

[21] Having examined the facts of this case as they relate to the four-factor analysis of *Barker,* we conclude that the petitioner was denied his Sixth Amendment right to a speedy trial. As required by the ruling of the United States Supreme Court in *Strunk v. United States, supra,* 412 U.S. at 440, 93 S. Ct. at 2263, the indictment upon which the petitioner was convicted must be dismissed.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS THAT IT REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AND REMAND THE CASE TO THAT COURT WITH INSTRUCTIONS TO DISMISS THE INDICTMENT. COSTS TO BE PAID BY BALTIMORE COUNTY.

MURPHY, Chief Judge (dissenting).

I respectfully dissent from the holding of the majority that the petitioner's constitutional right to a speedy trial was violated. In my judgment, nothing in the terribly tedious and tortured history of this case from the time of Jones' arrest on July 12, 1972, to his trial on December 11, 1974, warrants the ultimate conclusion reached by the majority that the constitutional precepts enunciated in *Barker v. Wingo,* 407 U.S. 514, 92 S. Ct.

2182, 33 L. Ed. 2d 101 (1972), and its progeny, mandate that Jones be set free without trial because of the State's "dilatoriness" in bringing the case to disposition.

The majority divides the 29-month delay in bringing Jones to trial into three parts. As to the period from July 12, 1972, to July 21, 1973, it properly acknowledges that the delay was completely attributable to Jones' own actions. It similarly acknowledges that the delay from June 26, 1974, to December 11, 1974, was also attributable solely to Jones. It identifies the 11-month delay from July 21, 1973, to June 26, 1974, as the crucial period in assessing whether the State denied Jones' constitutional right to a speedy trial; it attributes the delay during this period entirely to the State's procrastination.

Stripped of excess detail, the chronology of significant events amounts essentially to this. The five-month period following Jones' arrest was taken up with the usual bevy of motions and preliminary skirmishing between Jones and the prosecutor. During this period no less than five lawyers, including F. Lee Bailey and Stephen L. Miles, entered their appearance on behalf of Jones. While a trial date in January of 1973 was agreed upon, Jones nevertheless filed a motion for a speedy trial on January 2, 1973. The State responded promptly by setting the case for trial. Just as promptly, Jones, acting through Bailey, waived his right to a speedy trial by letter dated April 5, 1973, wherein it was stated that "the defense does not demand immediate trial until such time as you are notified to the contrary." By May of 1973, Jones had discharged four of his lawyers, including Bailey, leaving Miles as his only counsel. Bailey did not, however, strike his appearance. Robert Frank entered his appearance as counsel for Jones on June 7, 1973. Shortly thereafter, Jones went to trial on federal charges; that trial lasted from June 18, 1973, to July 21, 1973.

The State took no immediate action to set the case for trial following Jones' conviction in the federal court, undoubtedly because it considered Jones' waiver of a speedy trial still viable. In September of 1973, Miles

struck his appearance as counsel for Jones; he had been indicted in July of 1973. Frank continued as Jones' counsel. The record indicates that plea negotiations were taking place during the summer and early fall of 1973. On November 14, 1973, Jones filed his second motion for a speedy trial, acting through Frank. By agreement of counsel, the case was set for trial on February 26, 1974, although Frank indicated his desire that the case be tried in January. Frank was then facing disbarment proceedings, with a hearing before a three-judge panel set for February 19, 1974. Jones' trial date was postponed, with the understanding that he would be arraigned on March 11, 1974, and a firm trial date fixed at that time. Frank was unavailable on March 11, 1974, and the hearing was postponed. Arraignment was reset for April 29, 1974, and trial was scheduled for June 26, 1974. As the trial date approached, Jones complained to the court that he was not ready for trial; he said that Bailey was still his lawyer, and he wanted him to represent him at the trial. Frank struck his appearance on June 19, 1974, and Bailey reentered the picture as counsel on June 26, 1974.

Bailey promptly waived Jones' right to a speedy trial until he could be available for trial. A trial date was agreed upon for November 18, 1974, but Bailey subsequently indicated that he would not be available on this date. The case was rescheduled for trial on December 4, 1974; Bailey appeared as Jones' counsel. After the jury had been empaneled, Jones moved for a change of venue, which was granted. The case was removed to another county and brought to trial a week later on December 11, 1974. Consistent with his past actions, Jones undertook to discharge Bailey and employ new counsel. Jones claimed he was not ready for trial, that he had 300 witnesses to call from all over the United States and needed a postponement. The court denied the request for a postponement. In desperation, Jones told the court, "I'd like to have a recess so I can think of something else. . . ." Thereafter, Jones sought to disrupt the trial and eventually had to be shackled and gagged.

The majority concludes that the facts show that Jones at all times had an attorney ready for trial, and that the delays attributable to him did not serve to mitigate the State's failure to bring him to trial between July 21, 1973 and June 26, 1974. While I agree that the delay attributable to Jones did not insulate the State from discharging its duty to bring Jones to trial, I think that the critical period began with the filing of the second speedy trial motion on November 14, 1973, and ended on June 26, 1974, when Jones again waived his right to a speedy trial. As the majority opinion indicates, truly exceptional circumstances existed during this period; among other things, the State's Attorney was on trial during January and February of 1974; Miles also was brought to trial in February on the indictment pending against him — an indictment which implicated Jones. Frank, although previously acquitted of criminal charges brought against him, was then Jones' only counsel and he was facing disbarment proceedings. Not all of the delay during this critical period was chargeable to the State; part of it was plainly due to Frank's unavailability and his practical inability to try the case during the pendency of his disbarment proceedings.

As I see it, the State's dereliction in bringing the case to trial during the critical period, and particularly in the spring of 1974, was not — all circumstances considered — so gross as to call for the ultimate sanction of dismissal of all charges against Jones. *Barker v. Wingo, supra,* requires that we engage in a "difficult and sensitive balancing process" in passing upon a claimed denial of the constitutional right to a speedy trial; it calls for a functional analysis of the right in the particular context of the case under consideration. In view of the extraordinary circumstances involved in *Jones'* case, and taking into account the four factors applicable in determining whether the constitutional right to a speedy trial has been denied, and giving them appropriate weight, I would agree with the Court of Special Appeals and affirm the judgment. In so concluding, I do not intend to indicate approval of the State's handling of the case. On the contrary, it appears to me that the State unwittingly permitted itself to be

manipulated by Jones, acting on his own and through a battery of attorneys, it being his grand design to obtain a dismissal of the indictment for lack of a speedy trial. That such a result ensued in this case under the majority's opinion should serve as a bitter lesson to prosecutors and judges throughout the State not to risk playing Russian roulette with the public's right to have criminal defendants brought to the bar of justice on a timely basis.

Judge SMITH authorizes me to state that he concurs in the views expressed herein.

APPENDIX B

JOHN EDWARD JONES *v.* STATE OF MARYLAND

[No. 131, September Term, 1975.]

Decided December 1, 1975.

CRIMINAL LAW — *Speedy Trial — Guarantees For — Barker Test — Factors To Be Considered From Time Putative Defendant Becomes An Accused Until Conviction At Trial — Length Of Delay — Two And One-Half Years Presumptively Prejudicial — Prejudice — It Certainly Was Not Intent Of Holding In Epps v. State To Create Compelling Presumption In Favor Of Accused Who Lays Claim To Lost Witnesses That Such Testimony Would Be Exonerative For To Do So Would Require Acceptance Without Question The Unsupported Allegation That Testimony Would Be Favorable And Additionally Would Have Been Available But For The Delay; However, For Witness' Absence To Weigh So Great Against State It Is Implicit That Delay Must Have Been Fault Of State It Being Clear, In Case At Bar, That None Of The Delay Was Solely Attributable To State Either By Neglectful Or Intentional Procrastination — Root Cause Of Delay Found Not Solely The Result Or Consequence Of Governmental Action Alone For A Substantial Part Of Admitted Delay Was Result Of Collateral Indictments And Trials Of The Accused's Counsel And State's Attorneys Affiliated With Case And Likewise Occasioned By Accused's Other Trials And At Behest Of His Counsel In Addition To Added Confusion By Accused Of Repeated Hiring And Firing Of Various Counsel — No Evidence Found That Delay In Trial Was Intentionally Purposeful Or Oppressive Nor Negligently Caused By State It Being Evident That State Discharged Its Constitutional Duty To Make Diligent, Good-Faith Effort To Bring Accused To Trial.* pp. 184-186, 195, 199-201

CRIMINAL LAW — *Collateral Estoppel — Denial Of Motion To Dismiss On Basis Of Collateral Estoppel Held Proper, Record Non-Supportive That Issues Litigated In Federal Court Were Same As Determined In Instant Case.* p. 201

CRIMINAL LAW — *Merger — Conviction Of Possession Of Heroin Sufficient To Indicate Intent To Distribute Vacated As Having Merged With Initial Charge And Conviction Of Simple Possession Of Heroin.* pp. 201, 202

CRIMINAL LAW — *Jury's Role As Judges Of Law — Article XV, Section 5 — Claim Of Denial Of Due Process — Article XV, Section 5 Of Maryland Constitution Repeatedly Upheld As Constitutional Despite Fact It Is, Of Itself, Unique If Not An Archaic Practice — Constitutional Change Initiated By Legislature Only Not By Courts.* pp. 205-206

H. E. F.

Appeal from the Circuit Court for Calvert County (BOWEN, J.).

John Edward Jones was convicted in a trial by jury of possession of heroin with intent to distribute, possession of heroin and two counts of possession of controlled paraphernalia and from judgments entered thereon, he appeals.

Judgment affirmed except conviction and sentence under count 2 vacated as merging with the conviction under count 1. Costs to be paid by the appellant.

The cause was argued before MORTON, DAVIDSON and LOWE, JJ.

F. Lee Bailey for appellant.

Albert Gallatin Warfield, III, Assistant Attorney General, with whom were *Francis B. Burch, Attorney General, William E. Brannan, State's Attorney for Baltimore County,* and *Benjamin Bronstein, Deputy State's Attorney for Baltimore County,* on the brief, for appellee.

LOWE, J., delivered the opinion of the Court. DAVIDSON, J., dissents and filed a dissenting opinion at page 206 *infra.*

John Edward Jones was tried before a jury in the Circuit Court for Calvert County, and convicted of narcotic law violations, nearly two and one-half years after his initial arrest. It would be rare, indeed, had his arguments on appeal not included an assertion that he was denied a speedy trial. Although two of his other arguments are of constitutional dimension, it is the trial delays that give us most pause.

Part of our concern lies in the relative nature of the right itself, which is consistent with delays and dependent upon circumstances. *Beavers v. Haubert,* 198 U. S. 77, 87. The

bulk of our difficulty was the need to reconstruct those circumstances from cold records, docket entries, pleadings, occasional correspondence and excerpts from transcripts of numerous cases all related, if not directly connected, to appellant as their focal point.[1] The conclusion we have reached is that appellant was not denied a speedy trial. Despite his protestations from the beginning, the record strongly suggests that he did not want to be tried but hoped to take advantage of the delay by setting the scene to obtain his future deliverance. *Cf. Barker v. Wingo*, 407 U. S. 514, 535. The pattern of behavior of appellant and his counsel compel that conclusion.

I

The right to a speedy trial is guaranteed to the accused in tandem by the Maryland Declaration of Rights, *King v. State*, 5 Md. App. 652, and the Sixth Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, *Klopfer v. North Carolina*, 386 U. S. 213. In *Barker v. Wingo*, 407 U. S. 514, the Supreme Court prescribed the test by which to determine whether a criminal defendant has been denied this right.

Under the *Barker* test, the four factors we must consider from the time "the putative defendant . . . becomes an 'accused' . . ." *United States v. Marion*, 404 U. S. 307, 313, until his conviction at trial are: length of delay, reason for delay, prejudice to the accused and assertion of the right by the accused. None of these four factors is a prerequisite to the finding of the deprivation of appellant's right to a speedy trial. Neither is any one factor a sufficient condition to find a deprivation. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Barker*, 407 U. S. at 533. On the other hand, while failure to assert the right will not serve as a

1. Parts of the record submitted were provided by agreement of counsel expressed at argument.

waiver, *id.* at 524, an accused may by express agreement or by his conduct waive the right to a speedy trial just as he may intentionally relinquish any other constitutional right. See *Johnson v. Zerbst*, 304 U. S. 458.

The Length of Delay

A delay of the length shown here of two and one-half years overall, is "presumptively prejudicial," *Barker v. Wingo*, 407 U. S. at 530 and surmounts the threshold question of whether there was a delay of constitutional proportions. *State v. Lawless*, 13 Md. App. 220, 229. We must then apply the three remaining factors of the exegetic test prescribed in *Barker v. Wingo, supra*.

Assertion of the Right

The record is replete with demands for a speedy trial and motions to dismiss for lack thereof. The only evidence contradicting those express demands is of a subtle nature which will be discussed with the reasons for the delay. While we have given the assertions the "strong evidentiary weight" to which they are entitled "in determining whether [Jones] was deprived of the right," *Barker, supra*, 407 U. S. at 531-532, we will discuss that weight in more appropriate context.

Prejudice

Appellant contends that three favorable witnesses, who would have been available at an earlier trial, were unavailable at his trial because two had died and one was missing. This is indeed a strong factor in appellant's favor. "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U. S. at 532.

In *Epps v. State*, 275 Md. 96 at 120, while discussing "prejudice", the Court of Appeals reflected upon testimony lost due to the delay:

> "Although admittedly speculative, the testimony of [the missing witness] might have been sufficient to have generated a 'reasonable doubt' as to [Epps'] guilt."

We cannot conceive that the Court of Appeals intended to create a compelling presumption in favor of an accused who lays claim to a lost witness, that such testimony would be exonerative. For such allegation to weigh so heavily in appellant's favor we must accept without question the unsupported allegation 1) that the testimony would have been favorable and 2) that the witnesses would have been available but for the delay.[2] Even by adjusting the scale so favorably in appellant's favor (without the ballast he failed to provide) we perceive a missing ingredient. For the witness's absence to weigh so against the State, it is implicit that the delay must have been the fault of the State. We express our view prefatorily that none of the delay was solely attributable to the State by way of either neglectful or intentional procrastination.

In considering prejudice, we are additionally admonished by *United States v. Marion*, 404 U. S. at 320 to consider not only prejudice to his defense but whether the delay would:

> ". . . seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . disrupt his employment, . . . curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."

Strunk v. United States, 412 U. S. 434, 439 recognizes that some of these factors may carry different weight where defendant is incarcerated after conviction in another jurisdiction. But even then prospects for parole and meaningful rehabilitation must be considered. While awaiting trial, appellant had been sentenced for an escape after his arrest and, by his own admission, had also been sentenced to 30 years by the federal court. There is nothing to indicate that these recently imposed sentences were subject to parole nor was it argued or alleged that parole was delayed by this case. Appellant's own attorney

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2. Appellant's testimony that the deaths occurred in 1973 is our only guide as to the date to which the loss was attributable.

recognized this when he wrote appellant in November of 1974:

> "I cannot believe that since your freedom does not at the moment hinge on the outcome of this litigation that the inconvenience of a couple of weeks is the real purpose behind your letter of October 25, 1974."

Barker also recognizes that the factors discussed in *Marion* are more serious for some than for others but inevitably present in all cases, because every defendant will be restricted either by incarceration or bail. *Id.* at 537. Here, however, as we have noted, appellant was serving other sentences and the restriction was implicit with or without the delay.

The Reasons for the Delay

(The Record)

Soon after appellant was arrested on July 12, 1972 he escaped. He was returned near the end of the month by F. Lee Bailey, Esquire, the first of a procession of attorneys,[3]

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3. The cover of the docket in this case lists the following counsel for Jones, apparently in order of their appearance: Robert H. Frank, William H. Murphy, Jr., F. Lee Bailey, Gerald Alch, Gerald Kroop, Stephen L. Miles, Stanley Needleman, William Carrier.

The following is a partial list of docket entries relating to Jones' legal representation:

8/21/72 - Order to enter the appearance of Stephen L. Miles.
10/13/72 - Order to enter the appearance of F. Lee Bailey and Gerald Alch.
10/13/72 - Order to enter the appearance of Gerald Kroop.
1/15/73 - Order to enter the appearance of William H. Murphy, Jr.
1/22/73 - Order to strike appearance of Stephen L. Miles.
6/7/73 - Order to enter the appearance of Robert H. Frank.
9/6/73 - Order to strike the appearance of Stephen L. Miles.

Robert H. Frank appeared as counsel for Jones on a number of motions filed up to 5/15/74. On 5/25/74 a hearing was held for the purpose of determining who Jones' counsel was. At that hearing Jones stated that Stephen L. Miles was his only attorney.

6/19/74 - Order striking Frank as attorney.
6/26/74 - Oral appointment of William W. Carrier.

At trial, Jones was represented by F. Lee Bailey with William W. Carrier as local counsel. However, during the course of the trial Jones repeatedly demanded different counsel.

hired and fired at random, and was indicted on July 27, 1972. Within three weeks the first of a series of local attorneys entered his appearance and the out-of-state law firm to whom appellant had surrendered himself wrote the State's Attorney requesting an extension on the deadlines for pre-trial motions set for the middle of the following month. Since appellant's motions for discovery, to suppress evidence, to disqualify the judge and for a jury trial were not filed until December 1, 1972, we assume the State acquiesced in that extension. Along with these motions appellant included a demand for speedy trial.

The State elected to proceed first on the escape charge. The case was decided (presumably on plea) in January of 1973. In the meantime, a motion was filed for change of venue. This motion is significant only in its characterization by the State as a delaying tactic "contrary to the express written agreement of the parties that the case would proceed on or after January 8th, without further delay. The Escape case is now set for January 9, 1973. The State vigorously opposes any delay."

1973 having thus begun with appellant's trial for escape, there followed closely the filing of several motions by appellant, the striking of appearance by one of appellant's lawyers and the entry of appearance of another. During the next two months of the year, the only apparent activity which followed the trial for escape seems to have been a hearing in open court on appellant's motion to suppress evidence, which was overruled on April 9, 1973.

The trial was set for June 25, 1973. However, on May 25, 1973, presumably because of the confusion surrounding the many lawyers representing appellant,[4] a hearing was held.

> "THE COURT: Mr. Jones, stand up. The reason for bringing you to court today is to find out who is your lawyer. You change lawyers faster than I change hats, and I want to know who is your attorney that represents you in this case? "

4. The record is not clear to what extent the eight in-and-out counsel participated or were manipulated by this court-wise defendant in the obvious ploy of utilizing dilatory devices of repetitious pleadings and hindrance by confusion of eight lawyers going in different directions when they weren't striking their appearances, reentering appearances or defending themselves.

Ironically, appellant indicated that his only attorney in the case was Stephen Miles who had been permitted to strike his appearance after petition and an order signed January 18, 1973. Appellant renounced all other counsel, several of whom were present and moved to be permitted to withdraw. Nothing in the record shows that any counsel not then present were so authorized. It later becomes clear that several stayed on.

For reasons not completely clear from the record, but presumably because the State deferred to the federal courts, the June 25, 1973 trial date was not honored in spite of a hearing judge's observation that the State trial had precedence. We do know from appellant's own testimony that the federal case against him continued for six weeks during the summer of '73, bringing us toward the end of summer.

As fall approached, Stephen Miles, who had participated in the defense of appellant in the federal courts, again struck his appearance. This time the record provides a glimmer of light on the "circumstances" surrounding that episode which clearly contributed to the succeeding delay. From the pleadings and exhibits submitted by appellant, it is clear that two of appellant's counsel became personally embroiled in accusations of attempting to bribe an assistant State's Attorney relating to their defense of appellant, for which they were subsequently indicted and tried. Miles was indicted in July of 1973 and tried in March of 1974.[5] Frank was tried in February of 1973. Miles' motion to strike his appearance on September 9, 1973 recites indicia of animosity between him and his co-counsel Frank arising from accusations and counter-accusations of the bribe attempts

5. As inferential evidence of the disruptive nature of these proceedings there was at least one subpoena in the record demanding the court records of this case and the escape case for December 3, 1973 for the trial of State v. Miles. It should be noted that Mr. Miles was not found to be guilty of the offense charged.

stemming from their representation of Jones.[6] Miles' appearance was struck. Frank and others stayed on.

In November of 1973 Frank again moved for a speedy trial for Jones; however, there is an indication even here that appellant did not desire that which he formally prayed. In acknowledging a trial date set for February 26, 1974, Mr. Frank included a statement that he did not waive his speedy trial motion of November 11, 1973. A letter from the State's Attorney to Mr. Frank clearly indicated that the State was given informal assurances that the speedy trial issue would not be pressed, notwithstanding the procedural prods of renewed motions and written expressions of non-waiver for the record. The letter dated January 9, 1974, a copy of which went to the court, said in part:

> "I note with some chagrin your reference in your January 7th letter that you do not waive any speedy trial motion that was filed on behalf of Mr. Jones. My recollection of various conversations with you in the Court House in Baltimore County was that you were not necessarily concerned with the trial of the Jones case but only in plea negotiations. In fact, at one time you indicated that you would be more than happy to accept a stet in the case of Mr. Jones providing the State would return the money seized from him at the time of his arrest. Of course, you will remember at that time I told you to give an appropriate four letter word greeting to Mr. Jones in response to that demand.
>
> At other times during these conversations, your only request was that in any trial that the State Nol Pros the proceeding against Mr. Strickland so that you would not have a potential conflict of interest with your representation of Messrs. Jones and Strickland. In view of possible motions that

6. *See* Maryland St. Bar Ass'n v. Frank, 272 Md. 528 in which Frank was disbarred effective November 7, 1974, for admitting payment of $3,000 to a deputy State's Attorney, Stuart Hirsch (*see* Md. St. Bar Ass'n v. Hirsch, 274 Md. 368) in order to influence the outcome of a case then pending.

> may be filed and in view of confusion concerning the representation of the defendants in this case, I am requesting Judge Proctor to set a pre-trial hearing date before the Court at which time all pre-trial motions would have to be filed and a final determination of representation by counsel be made."

While not conclusive of defense procrastination, that letter first gave voice to what appears implicit throughout the record. Although appellant's continued demands for speedy trial clearly preserve the issue, and are entitled to strong evidentiary weight, *Barker, supra*, 407 U. S. at 527, as with any evidence the weight given it ". . . must be considered together with such other circumstances as may be relevant." *Barker, supra*, 407 U. S. at 533.

An additional delay was explained by Judge Kenneth C. Proctor in a letter to counsel explaining the necessity for postponing the February 26, 1974 trial date. The letter said:

> "Sometime ago I scheduled the above captioned case for trial commencing on February 26, 1974, at that time anticipating that there would be no problem in making a Judge available for the trial of this case.
>
> However, with the trials of cases resulting from the investigation of the State's Attorney's Office, it has been necessary for us to send a Judge into Baltimore City, in exchange for the Judge from the Supreme Bench who must come out to Baltimore County, to preside at the trial of such cases. This, of course, leaves us shorthanded for the trial of cases in the regular assignment. In addition to this, at the time you made your request, Judge Walter R. Haile, who is handling the Criminal Jury assignment this term, had already scheduled cases to the end of March, so that I could not assign him to the trial of the above captioned case.
>
> For these reasons the above captioned case will have to be removed from the trial assignment for

> February 26 and rescheduled for sometime during the April Term of Court."

The "investigation of the State's Attorney's Office" is a reference to a gubernatorial directive proclaimed on November 13, 1972, *Irvin v. State*, 23 Md. App. 457, 458-59, constitutionally authorizing the Attorney General

> ". . . to investigate the allegations of corruption of public officials in connection with the arrest, pending prosecution and escape of one John Edward Jones, from the Baltimore County jail, and to pursue any evidence of criminal violations or administrative irregularities resulting from your investigation." *Green v. State*, 25 Md. App. 679, 704.

The very sketchy and discordant record (partially attributable to the refusal of the trial judge to hear evidence proffered by the State and appellant's response) does not disclose the extent nor the dates of this investigation. We know of Miles' indictment in July of 1973, and we know of Frank's disbarment effective November 7, 1974 for having admitted payment of $3,000 on September 21 or 22, 1972, to Deputy State's Attorney Stuart Hirsch in order to influence unlawfully the outcome of a case which may or may not have been that pending against appellant and his co-defendants.[7] *Maryland St. Bar Ass'n v. Frank*, 272 Md. 528. Notwithstanding the failure of the State to provide us with a record clearly setting out these dates and events, we cannot close out eyes to that which is recorded for posterity in our own opinions and in those of the Court of Appeals.[8]

On December 4, 1974, appellant was finally brought to trial in the Circuit Court for Baltimore County. However, a motion for change of venue was filed by appellant and granted on December 5, 1974. The trial was transferred to

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7. That was denied by Frank; however, the entire investigation was founded upon that assumption. See Green, *supra*, 25 Md. App. at 704.

8. There is some authority that we might have sought court records and statistics even beyond appellate opinions, Davidson v. Miller, 276 Md. 54, n. 7 but we decline to do so, fearful of the encompassing precedential effect.

the Circuit Court for Calvert County to commence on December 11, 1974.

On the day of trial in Calvert County, appellant made every effort to keep it from being tried, including another attempt to fire counsel and hire another. He asserted flat out that he was not prepared to proceed and offered every conceivable reason for further delay. He even had the audacity to ask for time to "think of something else."

> "THE DEFENDANT: First of all, your Honor, I ain't prepared to go to trial for this case. I've been putting in for a speedy trial for two and a half years and I didn't even know I was coming to Court today, the trial was coming to Court today and I ain't seen F. Lee Bailey for two and a half years. He ain't investigating the case properly. I've got three hundred and some witnesses I'd like to call in this case. I don't know what the State's Attorney talking about he's going to rush this case in three days. He's going to railroad me. He's going to railroad me right. He railroaded me once in Federal Court on the same charge and I got thirty years for it, so if you're going to railroad me in three days, just railroad me in three days. I've got three hundred and some witnesses to call. If he can call the Police here to testify against lies, I can call witnesses to counteract the Police to testify against me, my witnesses. My witnesses are all over the United States. I ain't even got Subpoenaes or nothing to call them. It might take three days to get one of them here.
>
> . . .
>
> JUDGE BOWEN: Anything else you've got to say?
>
> THE DEFENDANT: Yes, sir. I ain't prepared to go to trial and I'd like to call my witnesses on open Court motion before the trial starts.
>
> JUDGE BOWEN: Anything else?
>
> THE DEFENDANT: I'd like to have a recess so I can think of something else and read my file."

With two of his lawyers by his side, appellant initially chose to conduct his own defense, complaining that he no longer wanted to be represented by the counsel present, F. Lee Bailey and William Carrier, but had only recently decided to hire another, "Jeff Hoffman." Appellant's continued protests and interruptions became so disruptive that the judge, after repeated warnings, had him first shackled and gagged, then manacled, and finally removed from the courtroom only to be permitted to return when he agreed to conduct himself decorously. At every opportunity, however, he repeated that he was not prepared for trial.

> "Q All right. Do you have anything else you want to tell the Judge about the Speedy Trial Matter?
>
> A Not other than I just been trying to come to Court for this two and a half years and every time they postpone it, it is the State's fault. And then they rush me today and I wasn't prepared to come to trial."

The Reason for the Delay (Conclusions)

As is obvious from the facts as briefly outlined, the delay in bringing Jones to trial can be laid to both the State and to the defense, notwithstanding the appearance that "This period of delay resulted solely from the prosecutor's tactical decision . . . and the passive cooperation of the court with no heed being paid to [Jones'] unequivocal request. . . ." See *Epps, supra*, 276 Md. 96. The root cause of the delay here, however, was not solely "governmental action." Although nearly all postponements were initiated by the State [9] (which

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9. Twice appellant acknowledges in his brief that "Defendant Jones arguably waived his speedy trial right from June of 1974 forward until November 18, 1974, in order that counsel of his choice could be present . . . ." In light of his previous letter of April 5, 1973, this might be construed to be rather a broad reaffirmation of the forward waiver "until such time as the court is notified to the contrary," than to be limited to the postponement sought in the same telegram as appellant would have us believe. Exhibits of correspondence indicate a postponement from November 18, 1974 to December 2, 1974, when the trial was begun in Baltimore County. It was removed after mistrial on appellant's motion and tried in Calvert County on December 11, 1974, within a week.

includes court action, see *Epps, supra*, 276 Md. 96) that naked fact overlooks the underlying cause of the delay, and is otherwise counterbalanced by expressed efforts of both prosecutor and court, to bring the case to trial. Delays caused by other trials of appellant and of appellant's attorneys cannot be weighed against the State especially when the priority given is so obviously to effect justice rather than to obtain a prejudicial advantage. We are bound by the Court of Appeal's holding that overcrowded courts, and inferentially court congestion, is not a neutral reason for excusing a delay. *Epps, supra*, 276 Md. 96. But when that congestion is traced back to the defendant's doorstep, the confusion of clearing out the corruption brought to light by actions of his own lawyers is a far cry from the "tactical decision" of the prosecutor in *Epps*, "to try the defendants jointly."

A substantial part of the delay related to the indictments and trials of appellant's attorneys and the State's Attorneys, part was occasioned by other trials of appellant, and part was at the behest of appellant's counsel. All of these were in large measure beneficial safeguards helping to assure appellant of obtaining a fair trial. The reason for the investigation of the prosecutors, as well as his own counsel, regardless of its unrelated result, provided a degree of assurance that he would be fairly tried and fairly represented. Whether or not that is what appellant wanted, it is that only to which he was entitled. *Tipton v. Warden, Maryland House of Correction*, 28 Md. App. 206. The speed of coming to trial varies with the circumstances of each case.

> "However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and

depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' *Beavers v. Haubert*, 198 U. S. 77, 87, 49 L.Ed. 950, 954, 25 S. Ct. 573. 'Whether delay in completing a prosecution ... amounts to an unconstitutional deprivation of rights depends upon the circumstances.... The delay must not be purposeful or oppressive,' *Pollard v. United States*, 352 U. S. 354, 361, 1 L.Ed.2d 393, 399, 77 S. Ct. 481. '[T]he essential ingredient is orderly expedition and not mere speed.' *Smith v. United States*, 360 U. S. 1, 10, 3 L.Ed.2d 1041, 1048, 79 S. Ct. 991." *United States v. Ewell*, 383 U. S. 116, 120.

That appellant was at the vortex of this unique corruption investigation is a circumstance peculiar to this case. Faced with the unprecedented gubernatorially mandated corruption investigation of both prosecutors and defenders of the accused, the State had two alternatives. It could press for Jones' trial in spite of the investigation and indictments so closely related to it and thus provide Jones with the speed to which he claims entitlement; or, it could chance delay and ferret out the truth, assuring Jones as well as society that whatever the result of the trial, it was not conducted under a cloud of corruption. Jones was entitled to a fair trial and a speedy one. It was clear that the State could not assure him of both. Between "these nice sharp quillets of the law," the State sacrificed speed for certainty of fairness, an assurance that enured to the benefit of appellant. We can more readily assess responsibility for the period of delay between the bribe in September of 1972 and the disbarment of Frank in November, 1974, against Jones than we can charge it against the State. Of the two, the State's motives seem less impugnable. At worst we find the circumstances a "neutral" one.

We could hardly be expected to hold the State solely accountable for that portion of the delay attributable to the investigation and peripheral confusion. The proportion of fault attributable to society's attorney as cause for the delay is no greater than, if as great as, that attributable to

appellant's attorneys. As persistent as Messrs. Frank and Miles were in their demands that Jones be tried speedily, it was their conduct which brought on the delaying investigation, albeit, it was "ordered" by the State (governor). Jones, however, would "hold with the hare and run with the hound." He clutches to their assertions of the speedy trial on his behalf, but denies responsibility for their contribution to the cause of delay.

On April 5, 1973 F. Lee Bailey's office wrote the court indicating that the "defense does not demand an immediate trial until such time as the court is notified to the contrary." [10] The following month Jones represented to the court that he was going to fire all lawyers except Miles. Evidence from later correspondence of Bailey appear to support that result both by his letter of October 14, 1974 and Alch's telegram on June 26 which purported to "enter" Bailey's appearance. However, neither Bailey nor Alch ever struck their appearance first entered in the summer of 1972. They neither sought leave to withdraw nor did the court provide such leave pursuant to Md. Rule 751. Although Bailey and Jones were apparently at odds, it was Bailey who was ultimately present to represent Jones at his trial and still on this appeal. It was also he who once again requested a postponement when the June 26, 1974 trial date aborted and was to be reset for November 18, 1974. This was performed by Mr. Alch of Bailey's office who concluded the telegram requesting postponement with the sentence that "Jones has agreed to waive his right to a speedy trial." [11]

Interspersed throughout the entire period before and after these apparent waivers were sent, are demands for speedy trial by other lawyers who came and went before the final trial date, and by Jones himself; however, the record

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10. Mr. Bailey attempted to assuage the effect of that letter as a waiver by explaining the circumstances which gave rise to it. He explained that he too had been indicted — in Florida — and having filed a motion for speedy trial himself was compelled to stand ready in his own defense. Although the explanation was commendably frank, we may not consider its weight since it was no part of the record by stipulation or otherwise.

11. A third deferment was obtained by Bailey who requested a postponement of the November 18, 1974 trial date for two weeks by his letter of October 14, 1974 abovementioned.

continued to reflect Bailey's continued appearance and the standing waiver "until notified to the contrary." Bailey's renewed waiver in June (through Alch's telegram) interpretatively supports the appearance of a continuing waiver by counsel of record. Whether or not this pattern of conduct was "manipulated by Jones we know not. It is apparent that he has sought the advantage of it through the very lawyer who sang the Siren's song, luring the State to founder upon the rocks of delay. If the positions represented by Bailey's office were not waivers, they were representations of record which together with the other "circumstances" substantially remove from the State some of the onus of delay.

There is also evidence in the record that a portion of the delay was caused by plea negotiations engaged in by Jones, his attorneys, and the prosecutors. The "circumstance" surrounding the January 9, 1974 correspondence above quoted was clearly that some plea bargaining was being carried on at least up to that time. This is supported subsequently by a motion filed charging a violation of a plea bargain. Although we are told that overcrowded courts "may not be a 'neutral' reason for delay," clearly plea negotiations are attempted not only by the State for the benefit of society, but by the accused for his own purposes as well.

Neither plea negotiations, the representations of counsel of record, confusion by repeated hiring and firing of counsel, the corruption investigation, related trials in other courts, nor the resolution of the procedural motions, as a single factor, even when carried on over a prolonged period, may condone an excessive delay in coming to trial. Two and one-half years has the appearance of prejudice even where an accused must be dragged to trial kicking and screaming as was Mr. Jones. Yet where such delay may not be readily forgiven, circumstances (which alter every case) *may* permit that it be excused.

The *Barker* Result

In *Barker*, *supra*, 407 U. S. at 535, the Supreme Court concluded upon review that "Barker did not want a speedy

trial," and it declined to reverse his conviction in spite of a *five year* delay. The Court surmised that:

> "The *probable reason* for Barker's attitude was that he was gambling on Manning's [a co-defendant] acquittal. The evidence was not very strong against Manning, *as the reversals and hung juries suggest*, and *Barker undoubtedly thought* that if Manning were acquitted, he would never be tried." (Emphasis added).

The Court does not spell out to us the reasons for their conclusion. The opinion merely tells us that:

> "... *the record strongly suggests that* while *he hoped* to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." (Emphasis added). *Id.* at 535.

The record here also "strongly suggests that [Jones] hoped to take advantage of the delay" to which his actions and the actions of his lawyers had contributed (if not caused) and thereby obtain a dismissal of the charges. It further not only "strongly suggests" but rings out the message that Jones did not want to be tried. Our suspicion is raised not only by Jones' apparent manipulation of the legal counsel representing him, nor by his involvement in pending negotiations, but also by his own proclamation when he eventually came to trial that he was not yet ready for it even then.

In May of 1974 Jones filed motion upon preliminary motion, some new and some seemingly repetitious, all of which required considerable time to respond properly or hear. Among these were motions for dismissal (for lack of speedy trial among other grounds), particulars, exculpatory evidence, inspection of grand jury minutes, severance (which was granted), etc. The content of some of the motions, such as the ones related to discovery, indicate preliminary preparations and negotiations being attempted by the defense which simply are not in concert with his persistent

formal demands for speedy trial.[12] But even more compelling is the correspondence from out-of-state counsel expressly negating demands for speedy trial. The delays attributable to Mr. Bailey's office request were concededly recognized, if not condoned by appellant in November of 1974. The intermittent hearings on the plethora of motions filed by his attorneys from time to time were also "procedural safeguards provided an accused." *Ewell, supra*, 383 U. S. at 120. Appellant's many legal gladiators obviously differing in the use of the constitutional right to speedy trial used it alternately first as a sword then as a shield. "Delay is not an uncommon defense tactic" *Barker*, 407 U. S. at 521, and appellant used it to the very end when, after an aborted trial December 4, 1974, he continued his avalanche of motions including a motion for psychiatric evaluation and a successful effort to have the case removed to its final situs in Calvert County.

As to the State, we found not one scintilla of evidence that the delay was intentionally "purposeful or oppressive," *Pollard v. United States*, 352 U. S. 354, 361, nor even that it was negligent which is "[a] more neutral reason. . . ." *Barker, supra*, 407 U. S. at 531. The record shows continued activity; the delays were at varying stages acquiesced in and contributed to by appellant.

Upon most appeals a reversal means a remand for a new trial, but

> "[t]he amorphous quality of the right [to a speedy trial] . . . leads to the unsatisfactorily severe remedy of dismissal of the indictment when the

12. No inference should be drawn that we are implying a deterrent to filing of preliminary motions. We simply point out that when motions are filed (and/or refiled) which presuppose judicial deliberations before decision, the state of mind of movant may not be that he is prepared to proceed immediately. For example, discovery may, and often does, provide the basis for the course of a defense which may not be planned until the motions are disposed of. When discovery is requested simultaneously with a demand for speedy trial, the defendant must mean that he is not at that moment prepared to go ahead but anticipates that he will be prepared to proceed expeditiously (within a reasonable time) after the discovery motions are decided. What is reasonable thereafter would also vary with the success of his discovery efforts.

> right has been deprived." *Barker, supra*, 407 U. S. at 522.

When the nature of the remedy so enhances the potential danger to society, we must be especially careful not to permit legal fictions to obscure our common sense. If we close our eyes to what is there because by its nature it is difficult to discern or to articulate — or because it was not transcribed in a simple record for easy review — the only alternative is the serious consequence of a criminal fairly convicted on abundant evidence that will be freed with a recidivistic potential made more likely because he "beat" the charge.

The lingering question we must answer in the face of appellant's repeated demands is, whether the State discharged its "constitutional duty to make a diligent, good-faith effort to bring him . . . [to] trial"? *Smith v. Hooey*, 393 U. S. 374, 383. Our unequivocal answer is yes.

II

Appellant next contends that the court erred in denying his motion to dismiss on the basis of collateral estoppel. The short answer here (contrasting our prolonged speedy trial analysis) is simply that the record does not provide us with evidence that the issue litigated in the federal court is the same as that here determined. Appellant's prosecution below was for acts committed on July 11 and 12 of 1972. He asserts in his brief reliance upon an acquittal in the summer of 1972 for a similar offense "on or about July 31, 1972." Since both charges had at their base possession of narcotics on dates over three weeks apart, we fail to see the logical application of the double jeopardy offshoot — collateral estoppel.

III

Appellant's third assignment of error is meritorious. A conviction of simple possession of heroin charged in count 2 merged with the conviction of possession of a sufficient quantity reasonably to indicate an intent to distribute in

count 1. We will, therefore, vacate the verdict and sentence of the lesser charge, *Gray v. State*, 10 Md. App. 478, which sentence was concurrent in any event.

IV

Appellant's initial requests for instructions were not in the record. His description of the request denied, of which denial he complains, is included by way of objection following the instruction:

> "Mr. Bailey: May it please the Court, may the record show that prior to the giving the charge to the jury I presented a number of instructions, all was given save one and that one was that the instructions of the Court are the sole and exclusive source of the law and the jury may find the law from no other source than the instructions of the Court and that they are absolutely obligated to follow those instructions, particularly those of constitutional dimension; the most important of which in all the circumstances of this trial is the impermissible nature of drawing an inference from the silence of the Defendant; a right upon which the Court has spoken very clearly."

It is manifest in the request so described that appellant objected to the court's instruction pursuant to our unique State Constitutional procedure in Section 5 of Art. XV which reads:

> "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

Unquestionably the judge understood that to be the case:

> "JUDGE BOWEN: For the purposes of the record, what Mr. Bailey says about the instruction which he requested; that is, that the law as the Court gives it is binding and mandatory upon the

> jury and may not find it otherwise is correct. Mr. Bailey and counsel for the State discussed this matter at length when the instructions were discussed. He requested in the instructions that this be given. The Court indicated at that time we would not give the instruction but would give him an exception at the conclusion of the charge, both to the Court's refusal to give it in the original instructions and to now refuse to go back and now give it as an amended instruction.
>
> The Court understood precisely the material which Mr. Bailey requested and we think that the exception should and is intended to preserve for all appropriate appellant review the issue of whether or not such instruction would violate the Defendant's right of the United States' Court [Constitution]."

It thus becomes clear that the instruction to which exception is taken is that portion saying:

> "Now you are advised that this does not mean that you are free to make law or change the law or to find it as you think it was yesterday or will be tomorrow or ought to be today. Your responsibility to the best of your ability is to determine what the law at the present time is insofar as it pertains to the matters before you in this case and you apply that law, as you find it to be, to the facts as you find them to be. Therefore, everything the Court says to you in these remarks is advice only. You are not obliged to follow it and counsel should they wish to do so will be permitted to argue to you that the law is other than as the Court advises you it is.

Parenthetically we note, then, that it was clearly understood that the question sought to be preserved and presented to us is that expressed by appellant in his brief, *i.e.*:

> "Whether the Maryland Constitution establishing

> the jury in a criminal case as judge of law as well as fact and the judge's charge to that effect is violative to federal constitutional due process requirements binding upon the states."

The pains to which we have gone in setting out the question serve a twofold purpose. First we accept head-on appellant's renewed attack on Section 5 of Art. XV. Secondly, we make it quite clear that appellant did not ask that the jury be instructed that its role as judges of the law carried with it no right to pass on constitutional matters, *cf. Hitchcock v. State*, 213 Md. 273, or to withhold constitutional safeguards. See Md. Rule 756 f and g. It is because appellant's argument necessarily presupposes that the jurors rejected the constitutional safeguards of which they were advised, that we have pinpointed his attack as a frontal one against the jury's role under the Maryland Constitution and not a peripheral one asking for instructions of one or more of the limitations upon that role as set out by the Court of Appeals in *Giles v. State*, 229 Md. 370, 382-386. Appellant made no such request below, nor does he indicate any interest upon appeal as to what extent, if any, such qualifying instructions should be granted upon request.

His argument is a most beguiling one but hardly convincing. He contends that the instruction given the jurors under Md. Constitution, Art. XV, Sec. 5 is a denial of due process. He notes especially that one charged with so heinous a crime as heroin distribution, and who comports himself so reprehensibly in the courtroom as to require his being bound, gagged and finally removed, can hardly expect a juror to cloak him with the presumption of innocence when he is told by the judge that the instruction to that effect is advisory only. Such juror is expressly told, goes the argument, that *he* is the sole judge of the law, therefore, he is free not only to disregard the presumption of innocence but also to lessen the State's burden of proof from beyond a reasonable doubt to a level of hardly requiring any doubt at all.

Appellant now argues that the "trend" of the Supreme

Court decisions is firmly fixed in protecting the presumption of innocence by strictly holding the State to its burden of proof beyond a reasonable doubt throughout the trial. *E.g., Mullaney v. Wilbur*, 421 U. S. 684, 44 L.Ed.2d 508.

Regardless what our personal opinion of Art. XV, Sec. 5 may be, we are not the forum for change. Constitutional change in Maryland must be initiated by the Legislature and consummated by the people. Beyond that, in this State the Court of Appeals is the final word on constitutional validity, and that which it speaks binds us to the result. The Court of Appeals has repeatedly spoken on this subject. The Supreme Court has itself recognized this unique, if not archaic, practice and by such express recognition approved it *sub silentio*. The history of court review of this provision was reviewed in an alembic for this Court by Judge Scanlan in *Wilkens v. State*, 16 Md. App. 587, 604-605:

> "The constitutionality of Article XV, Section 5 has been repeatedly upheld by the Court of Appeals and by this Court. *Slansky v. State*, 192 Md. 94, 63 A. 2d 599 (1949); *Giles v. State*, 229 Md. 370, 183 A. 2d 359 (1962); *Avey v. State*, 1 Md. App. 178, 228 A. 2d 614 (1967); *Lewis v. State*, 2 Md. App. 678, 237 A. 2d 73 (1968); *Avey v. State*, 9 Md. App. 227, 263 A. 2d 609 (1970). Moreover, the Supreme Court of the United States has had occasion to consider Article XV, Section 5, but has failed to intimate doubts about the constitutionality of the provision. In *Giles v. Maryland*, 372 U. S. 767 (1963), the Supreme Court dismissed an appeal which raised this issue, along with others, for want of a substantial federal question. See also *Brady v. Maryland*, 373 U. S. 83 (1963), in which the court discussed Article XV, Section 5 without questioning its constitutionality.

The whole question was carefully addressed by the Fourth Circuit, speaking through Judge Sobeloff, in *Wyley v. Warden*, 372 F. 2d 742, 744 (4th Cir. 1967). In that case, the Fourth Circuit

rejected Wyley's challenge to Article XV, Section 5, based upon a claim that the provision denied him due process and equal protection of the law in violation of the Fourteenth Amendment."

The opinions of those two Courts of finality as we expressed them, have not changed. As recently as 1974 both Courts declined to review that question when it denied certiorari in *Bremer v. State*, 18 Md. App. 291, 349-350, *cert. den.* 269 Md. 755, *cert. den.* 415 U. S. 930.

Judgment affirmed except conviction and sentence under count 2 vacated as merging with the conviction under count 1. Costs to be paid by the appellant.

Davidson, J., dissenting:

Upon my constitutionally mandated independent appraisal of the record, I am persuaded that John Edward Jones was denied his constitutional right to a speedy trial. I respectfully dissent.

I. Length of Delay

Two and one-half years elapsed between Jones' arrest and trial. I agree with the majority that this delay was long enough to require scrutiny of the interrelated factors involved in the sensitive balancing process of determining whether an accused has been denied his right to a speedy trial.

II. Reasons for Delay

On 12 July 1972, Jones was arrested and taken to the Baltimore County Jail. Almost immediately he escaped. Upon the advice of F. Lee Bailey, an attorney, Jones surrendered himself within a matter of days. On 27 July, Jones, Kevin Darby, a/k/a Kevin Jones, Brenda Lou Pinkett and Andrew Strickland were jointly indicted for narcotics

violations (No. 44607) allegedly committed on 12 July. In a separate indictment (No. 44609) Jones was charged with escape. On 21 August, Stephen L. Miles, a local attorney, entered his appearance for Jones. On 13 October, F. Lee Bailey and his associate, Gerald Alch, out-of-state attorneys, and Gerald Kroop, a local attorney, also filed their appearances.

By 17 October, the prosecutor had made the tactical decision to try the escape charge first. A trial date of 29 November was suggested. Alch objected to trial of the escape charge before trial of the narcotics charges because such action "would illegally prejudice the defendant." He asserted Jones' desire for an immediate trial by asking that the narcotics charges be tried first. He requested a change in the suggested trial date, explaining that Bailey would be unavailable.

On 25 October, the court, after setting deadlines for pretrial motions, ordered that "trial of this case will be scheduled no later than December 15, 1972." No explanation was offered as to why a trial date was not then set. On 6 November, after extending the deadlines for pretrial motions at Bailey's request, the court reiterated that trial of the narcotics charges would be scheduled no later than 15 December. No trial date was set. No explanation was offered. By 1 December, Jones filed a flurry of timely motions. No trial was held and no trial date was set on 15 December 1972. No explanation was offered.

The five month delay between 12 July and 15 December 1972 was not excessive and is attributable to the orderly processes of the law, a "neutral reason" for delay. By 15 December the case was ready for trial, and the responsibility to bring it to trial rested upon the State.

On 2 January 1973, Jones filed a motion for speedy trial with respect to the narcotics charges, invoking his constitutional right to speedy trial, entitling his case to special attention which is something more than that accorded by the "orderly processes of the law." Nevertheless, the orderly processes of the law moved on.

On 11 January, Jones then represented by Bailey, pled guilty to the escape charge and was sentenced to a term of 13 months. No trial date for the narcotics charges was set. No explanation was offered. On 15 January, William H. Murphy, Jr., a local attorney, entered his appearance and on 22 January, Miles struck his appearance. Notwithstanding the fact that Jones was at all times represented by counsel, no trial date was set. No explanation was offered. On 5 April, Bailey indicated that because of his other commitments, "[illegible]efense does not demand an immediate trial until such [illegible]as [the court is] notified to the contrary."

The three and one-[illegible]f month delay from 15 December 1972 to 5 April 1973 [illegible]lted first from the prosecutor's tactical decision, made [illegible]er Jones' objection, to try the escape charge before the narcotics charges, and thereafter, from the State's indifference and neglect in failing to set a trial date, despite Jones' motion for speedy trial. All of this delay must be attributed to the State. While indifference and neglect are more neutral reasons than a deliberate attempt to delay the trial, delays caused by either must be attributed to the State.

On 3 May, Jones was indicated for violation of federal narcotics laws (C.A. No. 73-0268, D.C. Md.). No date was set for trial of the narcotics charges pending in the State court. No explanation was offered. On 25 May, notwithstanding that Jones was then represented by Bailey, Alch, Kroop and Murphy, a hearing was held, according to the court, to determine who represented him. Miles, Kroop and Murphy were present. The following colloquy ensued:

. . .

"THE COURT: Now, who is your attorney that is going to represent you in this case?

"MR. JONES: Steve Miles on that.

"THE COURT: Mr. Miles is to be your attorney?

"MR. JONES: Yes.

"THE COURT: Is he the only attorney that you want to represent you?

"MR. JONES: Yeah.

. . .

"THE COURT: Also Mr. F. Lee Bailey's appearance has been entered. Do I understand that you don't want Mr. Bailey to represent you?

"MR. JONES: No.

"THE COURT: Have you advised Mr. Bailey of that election on your part?

"MR. JONES: Yes.

"MR. MILES: Your Honor, I have just shown the State a copy of a letter Mr. Jones wrote in my presence on the 22nd of May discharging him from the case. I also spoke to Mr. John Truman of his office yesterday and informed him of the provisions of the letter and these proceedings.

"THE COURT: Mr. Truman was down here for the hearing on the motions earlier, but the appearance entered is Mr. Bailey and Gerald Alch.

"MR. MILES: I understand they were both unavailable because they're both hither and dither.

"THE COURT: But both of them are discharged as counsel by Mr. Jones; is that correct?

"MR. JONES: Yes."

Jones, having discharged Bailey and Alch because he "didn't want [them] to keep holding this case up," stated that he did not want to be represented by Murphy and Kroop. Motions made by Kroop and Murphy to strike their appearances, were granted, but the appearances of Bailey and Alch were not stricken. As a practical matter, thereafter Jones was represented only by local counsel.[1] Because Jones had then revoked his consent to further delay, the responsibility for

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1. On 14 October 1974, Bailey acknowledged that he had been discharged by Jones. The record shows that from 25 May 1973 through 26 June 1974, Bailey and Alch were inactive in this case. All activities relating to it, including the setting of trial dates, were conducted by the prosecutor and the court exclusively with local counsel, and without consultation or participation by Bailey and Alch.

bringing the case to trial once again rested upon the State. The one and one-half month delay from 5 April to 25 May 1973 is attributable solely to Jones.

At the 25 May hearing, the prosecutor announced that co-defendant Kevin Darby had recently been killed. He estimated that the narcotics trial would require only three days. After determining that trial of the federal case had not yet been scheduled, the court set the trial of the State narcotics case for 25 June. No explanation was offered why an earlier date was not chosen. On 7 June, Robert H. Frank, a local attorney, entered his appearance as co-counsel with Miles.

The trial set for 25 June did not take place. On 18 June, only 46 days after Jones' federal indictment, his federal trial began. The trial ended on 21 July. Jones, who had been represented at this trial by Miles, was convicted and sentenced to a term of 30 years.

The nearly one month delay which occurred between 25 May and 18 June 1973 was an unexplained delay attributable to the State. The one month delay from 18 June to 21 July 1973, caused by the federal trial, was caused by a neutral reason. On 21 July, the obligation to bring Jones to trial was once again placed on the State. The orderly processes of the law ground on. No trial date was set. No explanation was offered.

On 6 September, Miles struck his appearance. Frank remained counsel of record. On 14 November, Jones made another motion for speedy trial. The orderly processes of the law continued. No trial date was set. No explanation was offered.

A new trial date was set 26 December 1973, when the prosecutor and Frank agreed upon a tentative trial date of 26 February 1974, subject to confirmation by the court. The unexplained five month delay from 21 July to 26 December 1973 must be attributed to the State.

On 7 January 1974, Frank reasserted Jones' desire for speedy trial in writing, and said that his agreement did "not waive any speedy trial motion that was filed in behalf of the

Defendant and that, of course, we would like an earlier trial date if at all possible." On 9 January, the prosecutor stated in writing that in view of the "possible length of the Jones case" (previously estimated by the State to be three days), the 26 February trial date should be retained to prevent interference or delay in disbarment proceedings against Frank, then set for hearing on 18 February. With respect to speedy trial, the prosecutor said that from recollections of conversations, he thought Frank was "not necessarily concerned with the trial of the Jones case but only in plea negotiations," that he would, under appropriate circumstances, "accept a stet in the case of Mr. Jones," and that his only request was that "the State Nol Pros the proceeding against Mr. Strickland. . . ."

On 10 January, Frank reminded the prosecutor in writing that he had filed a motion for speedy trial, which meant that he "would like a trial at the earliest possible date," and that the prosecutor should not concern himself about possible interference with Frank's disbarment. He pointed out that previous plea negotiations and requests for *stet* or *nol pros* had no relevance to Jones' right to speedy trial.

The two month delay from 26 December 1973 to 26 February 1974 must be attributed to the State. The prosecutor's desire not to interfere with disbarment proceedings against Frank, then set for 18 February, is not a satisfactory explanation for the choice of 26 February, in the absence of an explanation why Jones' three day trial could not have been held between 26 December 1973 and 18 February 1974. Under these circumstances the State's failure to accord Jones the earlier trial date he requested is evidence of the State's indifference and neglect with respect to his right to a speedy trial.

On 7 February, Jones refused to agree to a postponement requested by the prosecutor. The orderly processes of the law continued. On 8 February, the court removed Jones' case from the trial assignment for 26 February, stating in writing:

"Sometime ago I scheduled the above captioned

case for trial commencing on February 26, 1974, at that time anticipating that there would be no problem in making a Judge available for the trial of this case.

"However, with the trials of cases resulting from the investigation of the State's Attorney's Office, it has been necessary for us to send a Judge into Baltimore City, in exchange for the Judge from the Supreme Bench who must come out to Baltimore County, to preside at the trial of such cases. This, of course, leaves us shorthanded for the trial of cases in the regular assignment. In addition to this, at the time you made your request, Judge Walter R. Haile, who is handling the Criminal Jury assignment this term, had already scheduled cases to the end of March, so that I could not assign him to the trial of the above captioned case.

"For these reasons the above captioned case will have to be removed from the trial assignment for February 26 and rescheduled for sometime during the April Term of Court."

No new trial date was set for the April Term. No explanation was offered.

The reasons offered by the court are unsound. No attempt was made to show the status of any of the defendants in the cases assigned on the criminal jury docket and whether any such defendants had requested a speedy trial. No reason was offered why one of those cases could not have been removed from the docket so that the instant case could be tried. Even assuming that the court was shorthanded, no reason was offered why, in a judicial circuit composed of 12 trial judges, Jones' case could not be set before a judge assigned to civil cases. In short, the reasons given unequivocally added up to no more and no less than the time-honored excuse of "overcrowded dockets."[2] Any delay resulting from

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2. Jones v. State, 241 Md. 599, 611, 217 A. 2d 367, 375 (1966).

postponement of the 26 February trial must be attributed to the State.

On 27 February, the court took action. Once again the orderly processes of the law were set into motion. Although Jones had asked to have the narcotics trial before the escape trial; had moved for speedy trial on 2 January 1973; had his 25 June 1973 State trial preempted by his federal trial; had moved for speedy trial on 14 November 1973; had vigorously asserted his desire for speedy trial in January, 1974; and had his 26 February 1974 trial aborted because of "overcrowded dockets," the court did not set a trial date. Instead, it scheduled an arraignment for 11 March 1974, at which "a firm trial date" would be set. On 1 March 1974, Frank, unable to attend the arraignment because of previous court commitments, waived his and Jones' right to be present in order to avoid delay of the trial. He emphasized that he had "been pressing for a trial date in this case for some time and would appreciate it if [he] would be notified as soon as one is set." No trial date was set. No explanation was offered.

On 22 April, the court ordered that motions be filed by 1 May and heard on 15 May. No trial date was set. No explanation was offered. The two month delay from 26 February to 22 April 1974 must be attributed to the State.

At a hearing on 15 May, the court considered a number of motions filed by Jones, many of which duplicated motions previously filed and decided, and others of which could have been filed earlier. The court, among other things, granted Jones' motion for severance and reserved ruling on his motion to dismiss for lack of speedy trial, in which he claimed substantial prejudice from the death of Kevin Darby, who allegedly would have been able to prove his innocence. A trial date of 4 June was set. No explanation for this delay was offered. On 21 May, Jones prayed a jury trial, and filed notice that there would be no stipulations. On 29 May, after a hearing, Jones' motion to dismiss for lack of speedy trial, among other things, was denied. Essentially all other pending motions were resolved. Because most of Jones' motions were duplicative or could have been filed earlier, the

resulting one and one-half month delay from 22 April to 29 May 1974 must be attributed to him.

The trial set for 4 June did not take place. No explanation was offered. By 14 June, trial was set for 26 June. The one month delay from 29 May to 26 June 1974 must be attributed to the State.

On 19 June, Frank struck his appearance. Jones was without local counsel and apparently resorted to Alch. The trial set for 26 June did not take place. Alch was ill and did not appear. He notified the court that Bailey had authorized him to enter an appearance; that Bailey would be available 18 November to defend the case; that William Carrier would enter his appearance that day as local counsel for Jones; and finally that "Jones has agreed to waive his right to a speedy trial . . . until requested date of November 18, 1974." Trial was set for 18 November. This five month delay from 26 June to 18 November 1974 must be attributed to Jones.

On 14 October, Bailey acknowledged that he once again had been retained to handle the matter, and that due to other court commitments, he was unavailable for trial on 18 November. He reiterated Jones' desire for an immediate trial, and requested a postponement of about two weeks, subject to Jones' consent. On 25 October, Jones wrote to Bailey expressing his dissatisfaction with any postponement. On 12 November, Bailey replied to Jones that: "I cannot believe that since your freedom does not at the moment hinge on the outcome of this litigation that the inconvenience of a couple of weeks is the real purpose behind your letter of October 25, 1974." On 25 October, the court wrote Bailey that:

> "The above captioned case, as you know, is scheduled for trial commencing on Monday, November 18, 1974. *Your client has been pressing for a speedy trial for sometime, and in fact has filed a written motion to that effect. Accordingly, the trial cannot be postponed without his consent in writing.*
>
> "As you were committed to this trial date

> sometime ago by a member of your firm, unless Defendant consents in writing to a delay in the trial, it must proceed as scheduled." (Emphasis added.)

On 5 November, Bailey wrote Jones seeking his consent to the delay. On 11 November, Jones wrote the court that he did not want a postponement of his 18 November trial, but his letters were not received by 18 November. On 12 November, Carrier moved to strike his appearance because, among other things, there had "been little communication with Mr. Bailey concerning the case and no factual preparation for trial." His appearance was not stricken.

In the meantime, on 13 November, the court wrote Bailey that, despite the failure to secure Jones' consent, trial was reset for 2 December. Finally, on 21 November, the court, having received Jones' letter of 11 November 1974, wrote to Jones that:

> "Not having heard from you previously, I assumed that you agreed to the postponement of this case to December 2."

On 21 November, Jones' *pro se* motion for speedy trial was filed. For unexplained reasons, trial did not begin until 4 December.

The two week delay between 18 November and 4 December 1974, was a flagrant example of the persistent lack of concern for Jones' constitutional right to speedy trial, which characterized this case. This delay must be attributed to the State.

On 4 December, Jones, represented by Bailey and Carrier, was brought to trial. A motion for a change of venue was granted and trial began in the Circuit Court for Calvert County on 11 December. The consequent five day delay is not attributable to the State. Jones' motion to dismiss for lack of speedy trial was immediately denied. On the second day of trial, Jones' renewed motion to dismiss for lack of speedy trial, made *pro se*, was denied. On the third day, Jones was found guilty.

Approximately two and one-half years had transpired between Jones' arrest and his trial. Six and one-half months of delay are attributable to neutral reasons, eight months are attributable to Jones and 14.5 months of delay are attributable to the State. The only reasons for the State's delay, affirmatively shown by the record, were its election to try cases other than Jones' narcotics charges, overcrowded dockets, and a total indifference to and neglect of Jones' right to speedy trial, exhibited at virtually every step of the proceeding, even after Jones, on 2 January 1973, had invoked the protection of the Constitution. Since the 14.5 month delay was not caused by sound or legitimate reasons, the State failed to meet its responsibility to bring Jones to trial.

The majority relies upon six factors, none of which alone would condone delay, but all of which together, they conclude, may permit that the delay be excused. They first point out that:

> "A substantial part of the delay related to the indictments and trials of appellant's attorneys and the State's Attorneys, part was occasioned by other trials of appellant, and part was at the behest of appellant's counsel. All of these were in large measure beneficial safeguards helping to assure appellant of obtaining a fair trial. The investigation of the prosecutors, as well as his own counsel, would provide a degree of assurance that he would be fairly tried and fairly represented. Whether or not that is what appellant wanted, it is that only to which he was entitled."

As set forth above, I agree that the one day of 11 January 1973, required for Jones' escape trial, the month from 18 June to 21 July 1973, required for Jones' federal trial, the one and one-half months between 5 April and 25 May 1973, and the five months between 26 June and 18 November 1974, set aside at the behest of Jones' counsel, are not attributable to the State.

I do not agree with the majority's assertion that Bailey's

failure to strike his appearance and his failure to notify the court that he was withdrawing Jones' waiver of his right to speedy trial, constituted, between 25 May 1973 and 26 June 1974, a "waiver" of Jones' right to speedy trial, or a "representation" that Jones did not want a speedy trial, or a "siren song luring the State to founder upon the rocks of delay."

On 5 April 1973, Bailey did waive Jones' right to speedy trial until the court was notified to the contrary. On 22 May, Jones, in the presence of Miles, discharged Bailey and Alch. Miles himself confirmed the discharge by a telephone call to Bailey's office. On 25 May 1973, in open court, Jones asserted that he had discharged Bailey and Alch, stating that he wanted Miles alone to represent him. In open court Miles confirmed the discharge. The prosecutor, then present in court, heard these assertions. The judge, also present, heard these assertions, and, without consulting Bailey and Alch further, set trial for 25 June 1973. Subsequently, Bailey himself confirmed that he had been discharged.

Between 25 May 1973 and 26 June 1974, Bailey and Alch did not participate in any activities affecting Jones. During that period all motions were filed by local counsel, all negotiations involving pleas and the setting of trial dates were conducted between the prosecutors and the court on the one hand, and local counsel on the other, without reference or consultation with Bailey and Alch. The case was set for trial on 25 June 1973, 26 February 1974 and 4 June 1974 without consultation with or notice to Bailey and Alch. The trials set for those dates were aborted without notice to or consultation with Bailey and Alch. Moreover, it was Miles, not Bailey and Alch, who represented Jones in his federal trial held between 18 June and 21 July 1973. Finally, during this entire period Jones' right to speedy trial was repeatedly asserted.

Based on this record I am persuaded that despite Bailey's failure to strike his appearance in accordance with the rules, and to notify the court that he had withdrawn his waiver of Jones' right to speedy trial, Jones, local counsel, Bailey,

Alch, the prosecutor and the court were all aware of and accepted the fact that Bailey and Alch did not represent Jones between 25 May 1973 and 26 June 1974, and that on 25 May 1973, Bailey's waiver of Jones' right to speedy trial had been revoked and terminated. In concluding that Bailey's failure to strike his appearance and withdraw his waiver of Jones' right to a speedy trial, misled the State and thereby caused or excused the delay from 25 May 1973 to 26 June 1974, the majority, despite its own admonitions, permits the sirenic lure of "legal fictions to obscure our common sense."

Nor do I agree with the majority's conclusion that, underlying a substantial part of the delay, was the "congestion and confusion" resulting from a "cloud of corruption" allegedly caused by activities of Jones' attorneys, which, in the majority's view, had to be eliminated in order to assure Jones a fair trial and fair representation. No prosecutor or trial judge ever articulated any such reason for any of the delays. Nor did the State suggest such an explanation in its brief or oral argument. Moreover, the facts do not support such a conclusion.

The majority takes a myopic view of the facts surrounding the "cloud of corruption" by limiting its inquiry to "that which is recorded for posterity in our own opinions and in those of the Court of Appeals." A more complete, and therefore more intelligible, view of the "cloud of corruption" is achieved by an examination of matters of which judicial notice may be taken, including court records in other cases, a Special Report of the Grand Jury,[3] and various items of common knowledge, derived from extensive media coverage.[4] Those sources indicate that on 25 September 1972, Frank, who had not yet entered his appearance, was indicted for an attempt to bribe Stuart E. Hirsch, then Deputy State's Attorney for Baltimore County, to procure acquittals

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3. Special Report of the Grand Jury for Baltimore County, April Term 1973. The Daily Record (Baltimore), 14 September 1973, at 2, col. 1.

4. Indeed, some of the newspaper articles relating to these matters are attached to Jones' motion for change of venue, made 5 December 1974, and appear in the record of this case.

or probation without incarceration for Jones in his escape and narcotics cases. Frank's trial was removed to Kent County on 20 October 1972, and was held there between 29 January and 7 February 1973. At the trial, Frank admitted he paid $3,000 to Hirsch to influence his actions in matters which Frank insisted were totally unrelated to Jones. He explained that the payment was a "shakedown" with respect to a matter which had been referred by the State's Attorney for Baltimore County to the State's Attorney for Baltimore City, which might result in indictment and prosecution of Frank in the Criminal Court of Baltimore, on a charge of illegal wiretapping in connection with a murder case totally unrelated to Jones. Frank was acquitted.

On 17 May 1973, Frank appeared before the Grievance Committee of the Maryland State Bar Association, where he took the same position. On 7 June 1973, he entered his appearance in Jones' case. On 12 September, the Maryland State Bar Association instituted disciplinary proceedings in the Court of Appeals alleging that Frank attempted to bribe Hirsch in order to influence unlawfully Hirsch's actions with respect to either Jones' cases or his own possible indictment and prosecution in Baltimore City. A three judge panel of the Supreme Bench of Baltimore City took evidence on 19 February 1974, and concluded that:

> "The evidence in this matter is clear and convincing that Respondent was guilty of professional misconduct. He attempted to bribe a public prosecutor by paying said prosecutor $3,000.00 in order to influence said prosecutor unlawfully and unethically in *either* (a) the criminal indictments then pending against Jones, Everson and Pinkett wherein Respondent was either counsel or advisor to said defendants *and/or* (b) a charge against Respondent himself for a violation of Article 27, Section 125(a) of the Annotated Code of Maryland which had been referred by the State's Attorney for Baltimore County to the State's Attorney for Baltimore City

> for possible indictment and prosecution of Respondent himself."[5] (Emphasis added.)

Thus, without specifically finding that Frank had bribed Hirsch with respect to Jones' cases, the court determined that Frank's action constituted a violation of the Code of Professional Responsibility, and on 9 May, recommended Frank's disbarment. On 19 June Frank struck his appearance. On 7 October 1974, he was disbarred.

On 13 November 1972, Governor Marvin Mandel directed the Attorney General to investigate:

> "[The allegations of corruption of public officials in connection with the arrest pending prosecution and escape of one, John Edward Jones, from the Baltimore County jail, and to pursue any evidence of criminal violations or administrative irregularities resulting from your investigation.
>
> "*In the event your investigation of the above discloses acts or conduct in other areas which warrant further investigation, grand jury action or prosecution, you are hereby directed to pursue the same,* and you and the members of your staff designated by you shall have all of the same powers with respect thereto that have been conferred by me as to the above." (Emphasis added.)

As a result of this investigation, indictments against the State's Attorney for Baltimore County (Samuel A. Green, No. 47552, 25 October 1973,) the Chief Investigator assigned to the State's Attorney's Office (Louis Irvin, No. 47466, 12 October 1973,[6]) and attorney (Miles, No. 46921-22, 20 July 1973,) and a bondsman (Herman Kimmelman, No. 46923-26, 20 July 1973,) were returned. The charges against Green, Irvin and Kimmelman all centered around illegalities related to the expungement of an arrest record after

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5. Maryland State Bar Association v. Frank, 272 Md. 528, 530, 531, 325 A. 2d 718, 719, 720 (1974).

6. Other indictments of Irvin were dropped before trial.

gambling charges erroneously placed against the owner of an automobile service station were dismissed. All of these charges were totally unrelated to Jones. None of them can be considered part of a "cloud of corruption" caused by Jones or his attorneys.

The only indictment related in any way to Jones or his attorneys, was the indictment on 20 July 1973 of Miles, who had represented Jones since 21 August 1972, but struck his appearance on 6 September 1973. The charges against Miles, including conspiracy with Jones to bribe Hirsch, centered around the allegation that on 15 July 1972, he appropriated to his own use approximately $72,000 given to him by Jones' mother to "fix" or "postpone" Jones' escape trial. In effect, he was charged with failing to bribe a public official. He was tried in the Circuit Court for Baltimore County between 25 February and 11 March 1974, and was acquitted.

The Frank case and the Miles case constitute the entire "cloud of corruption" allegedly caused by Jones' attorneys, which, in turn, allegedly created the "congestion" of the court calendar, which, in turn, allegedly justified the State's delay of Jones' trial.

In light of these facts, the amount of court congestion which can be "traced back to defendant's doorstep," is insignificant. The Green trial, held from 10 January to 6 February 1974; the Irvin trial, held from 31 October to 21 November 1973; and the Kimmelman trial, held from 26 to 28 November 1973, contributed to court congestion but were not traceable to "defendant's doorstep." Frank's criminal trial was held in Kent County. His disbarment proceeding was held in Baltimore City. Frank's activities did not contribute to court congestion in Baltimore County. Miles' trial, held in Baltimore County, occupied a maximum of 15 days. A single trial of this length cannot be used as justification for a delay of 14.5 months.

In light of the cold hard facts, "the investigation of the prosecutors, as well as [Jones'] own counsel" was not necessary to "provide a degree of assurance that he would be fairly tried and fairly represented." By 7 September 1973,

the investigation authorized by the Governor was complete and the Grand Jury report was filed. No prosecutor was charged with corruption directly related to or arising from Jones' cases so that after 7 September 1973, neither investigation nor trial of the prosecutors was required.

Nor was there a need for investigation and trial of Jones' own counsel. Miles, who had been indicted on a charge which did not involve corruption of any public official, as of 6 September 1973, no longer represented Jones. There was no need thereafter to try Miles before Jones to assure that Jones would be fairly tried and fairly represented. After 7 September 1973, Frank was the only lawyer representing Jones. He had admitted giving Hirsch money for purposes unrelated to Jones' cases, had been acquitted of all charges, and was awaiting the resolution of a disbarment proceeding. Frank was then a licensed attorney who had not been suspended or disbarred.[7] He was entitled to represent Jones or any other client. Jones was entitled to a lawyer of his own choice. Therefore, the State was not required to do anything to assure Jones of a fair trial and fair representation. Indeed, to prejudice Jones' right to a speedy trial because he was represented by an attorney who might one day be disbarred for having bribed a single public official, Hirsch, who was not involved in Jones' prosecution, constitutes a substantial, unwarranted interference with Jones' right to counsel. In addition, if the State's reason for delaying Jones' trial was, in fact, to await the outcome of the disbarment proceedings against Frank, it should have at least expressly so notified him, so that he might choose other counsel and obtain a speedy trial.

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7. At the time of Frank's disbarment, Maryland Rules BV1-10 governed disciplinary proceedings. Under Rule BV8, an attorney was authorized to practice law until the Court of Appeals determined his guilt and imposed a sanction. In February, 1975, new rules BV1-18 were promulgated, which reflect, among other things, the consideration of whether an attorney should practice law during the pendency of disbarment proceedings. Even under the new rules, which provide that an attorney convicted of a crime can be summarily suspended by the Court of Appeals, pending a disbarment proceeding, an attorney acquitted of criminal acts cannot be prohibited from practicing law until final disbarment. Maryland Rule BV16.

The record shows that such considerations were not, in fact, the reasons for the delays. Throughout the period encompassing Frank's indictment, the special investigation ordered by the Governor, Miles' indictment and acquittal, and Frank's disbarment, Jones was tried on the escape charge, and his trial on the narcotics charges was set on at least four different occasions. When it set those dates or aborted them, the State was not concerned with "clearing out the corruption contributed to by his own lawyers," nor with providing "a degree of assurance that he would be fairly tried and fairly represented."

On 11 January 1973, despite Frank's indictment and the gubernatorially directed investigation, trial on the escape charge was held. On 25 May, although disciplinary action had been instituted against Frank, trial of the narcotics case was set for 25 June. On 7 June, Frank, whose disbarment was pending, was permitted to enter his appearance. The trial scheduled for 25 June was postponed because of Jones' federal trial and not because of Frank's pending disbarment.

On 26 December 1973, the prosecutor and Frank, then the only attorney representing Jones, agreed to a tentative trial date of 26 February 1974. On 9 January, the prosecutor rejected Jones' request for an earlier trial, to avoid interference with Frank's disbarment hearing, then set for 18 February in Baltimore City. The prosecutor never did specifically state that Jones' trial was to be delayed until the matter of Frank's disbarment could be resolved. He offered no explanation as to why Jones' trial, previously estimated to require three days, could not be set between 9 January and 18 February 1974. Moreover, the authority of the three judge panel scheduled to hear the disbarment proceeding was limited to finding facts and making recommendations to the Court of Appeals, which alone has the power to impose sanctions.[8] Had the prosecutor genuinely believed it necessary to obtain a resolution of all charges relating to Jones' attorneys, to assure Jones a fair trial and fair representation, he would have insisted that Jones' trial not

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8. Maryland Rule BV11 b5, formerly Rule BV b5.

be set until final resolution of Frank's disbarment proceedings, or indeed until any possible disciplinary action against Miles had been resolved.

Jones' trial, scheduled for 26 February 1974, was aborted because of overcrowded dockets, and not out of a desire to assure Jones a fair trial and fair representation. Because Miles was not charged with bribing a public official, and no longer represented Jones, there was no need to try Miles, indicted 20 July 1973, ahead of Jones, indicted 27 July 1972.

I am not persuaded that Jones' attorneys were responsible for creating a cloud of corruption, congestion and confusion, which had to be eliminated to assure Jones a fair trial and fair representation. I am persuaded that the corruption investigation and resulting trials did no more than overcrowd the dockets. I find nothing in the investigation and resulting trials which either caused or excused the State's delay.

Nor do I agree with the majority that confusion by repeated hiring and firing of counsel caused or excused any of the delay which I have attributed to the State. At all times, except for one week between 19 June and 26 June 1974, Jones was represented by local counsel so that trial could have been set at any time. Moreover, between 25 May 1973 and 4 June 1974, Jones was represented only by Miles and Frank. No delay in the setting of a trial was ever requested by them, nor was any trial ever aborted because of their unavailability. Indeed, with the exception of the delays caused by Bailey and Alch, no delay of trial was ever occasioned by the hiring and firing of counsel. I do not understand how Jones' exercise of his right to counsel, in and of itself, and without more, can be regarded as having caused or excused any portion of the delay which I have attributed to the State.

In addition, I do not agree with the majority that plea negotiations caused or excused any of the delay which I have attributed to the State. The majority relies upon two pieces of evidence to support its conclusion. The first is a motion filed by Jones alleging that a plea bargain, agreed upon at the time of his escape trial, was violated because the State

failed to drop the narcotics charges against him. The second was a letter dated 9 January 1974, in which the prosecutor charged that Frank was not concerned with the speedy trial of Jones' case but only with plea negotiations and a *nol pros* for a co-defendant. The record in fact shows that on 10 January 1974, Frank vigorously denied the prosecutor's allegations, forcefully reasserted Jones' right to a speedy trial, and pointed out that plea negotiations had no relevance whatsoever to the motion for speedy trial.

Plea negotiations are an ongoing part of every defense which often continues until the moment of trial, and sometimes beyond. Although plea negotiations can, on occasion, be used by an accused for the purposes of delay, and can, in fact, result in delay, the evidence relied on by the majority shows only that plea negotiations did occur. There is no evidence here, other than a conclusionary characterization by a prosecutor, which had been denied, that these negotiations were undertaken for purposes of delay or resulted in delay. I will not infer from the bare fact that plea negotiations were conducted; that their purpose or result was delay. The right to negotiate for a plea need not be relinquished to avoid an inference either that a delay was caused by the accused or that a delay otherwise attributable to the State should be excused.

Finally, while I believe that because Jones' motions filed in May, 1974, were duplicative and could have been filed earlier, and the one and one-half month delay from 22 April to 29 May 1974, must be attributed to Jones, I am not persuaded, as is the majority, that the resolution of other motions either caused or excused the delay which I have attributed to the State. As evidence to support their conclusion, the majority points to a motion for a change of venue in the escape trial, filed on 5 January 1973, characterized by the prosecutor as a delaying tactic; "intermittent hearings" on the "plethora of motions filed by his attorneys from time to time;" and an "avalanche of motions" made on 4 December 1974, including a successful motion for change of venue, which resulted in removal of the case to Calvert County.

The record shows that on 11 January 1973, only six days after the 5 January motion for change of venue, the escape trial was held. The plethora of motions, other than those for speedy trial and those which resulted in delay which I have not attributed to the State, consisted of a motion for discovery and inspection on 25 January 1974, and the only intermittent hearing not otherwise accounted for, was held on 9 April 1973 to resolve Jones' 1 December 1972 motion to suppress evidence. No explanation for the delay in deciding this motion was offered by the State. The "avalanche of motions" made on 4 December 1974, consisted of a motion for disqualification, a motion to dismiss because a prosecutor had threatened prospective witnesses, and a motion for psychiatric evaluation. The motion for disqualification was denied. The other motions were not ruled upon. In any event, trial was held on 11 December 1974, only six days after the motions were filed.

The majority presents nothing to support an inference that these motions caused or excused any significant delay which I have attributed to the State. Indeed, I am deeply distressed at the notion, implicit in the majority's opinion, that the mere filing of a motion or motions is sufficient, in and of itself, without more, to raise such an inference. I simply do not believe that an accused must forego his right to make motions to avoid such an inference.[9]

Upon the record before me, I am persuaded that the underlying reasons for the 14.5 month delay which I attribute to the State, were the State's election to try cases other than Jones' narcotics charges, overcrowded dockets, and a total indifference and neglect of Jones' right to speedy trial. So far as I am concerned, none of the six factors relied on by the majority is sufficient, standing alone, to excuse

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9. The majority's reliance upon Jones' motion for change of venue, granted on 5 December 1974, which resulted in a five day delay, is particularly inappropriate. Jones' motion for a change of venue was based on allegations of pretrial publicity which identified Jones as a "narcotics kingpin," not only a week before trial, but also on the very morning of trial. The fact that it was granted, graphically illustrates that it was not made for the purpose of delaying trial but was made for the purpose of assuring a fair trial. The fact that trial was held on 11 December 1974 indicates that the motion neither caused nor excused a significant delay.

that delay. Moreover, when all of these factors are considered together, they remain insufficient to excuse that delay. Six times zero still equals zero.

III. Assertion of the Right.

As early as 17 October 1972, Jones objected to the prosecutor's election to try the escape charge before the narcotics charges and requested that the narcotics charges be tried first. On 2 January 1973, he filed a motion for speedy trial. On 5 April, in order to obtain the services of his then attorney, Bailey, he affirmatively waived his right to a trial. On 22 May, he discharged Bailey for the sole reason that Bailey's continued unavailability was delaying the trial.

On 25 June, Jones' State trial did not take place because of his federal trial. On 14 November, Jones made another motion for speedy trial. On 7 January 1974, Frank, in confirming an agreement to a tentative trial date of 26 February, requested an earlier trial date and specifically stated that "his agreement did not waive any speedy trial motion." On 10 January, Frank vigorously denied the prosecutor's insinuation that Jones did not desire a speedy trial and forcefully reiterated that Jones wanted a speedy trial. On 7 February, Frank refused to agree to the prosecutor's request for a postponement because of Jones' desire for speedy trial. On 1 March, Jones waived his right to be present at an "arraignment" scheduled for 11 March, at which a trial date was to be set, rather than suffer the delay which might have been occasioned by the unavailability of Frank. Reiterating that he was pressing for an immediate trial, he asked to be notified of the new trial date as soon as one was set. On 15 May, Jones made a motion to dismiss for lack of speedy trial.

By 26 June, Bailey and Alch were again representing Jones. Once again, to assure representation by Bailey, Jones affirmatively waived his right to a trial for the period between 26 June and 18 November upon which date he was then scheduled to be tried. When Bailey subsequently indicated his unavailability for trial on 18 November, he requested only a brief postponement because Jones wanted a

speedy trial. The court, recognizing Jones' repeated demands for a speedy trial, refused to grant a continuance without his written consent. On 25 October and 11 November, Jones expressed his desire to forego representation by Bailey and to proceed to trial on 18 November as scheduled. On 21 November, Jones made a *pro se* motion for speedy trial.

This record shows a persistent and unequivocal pattern of conduct on the part of Jones designed to obtain a speedy trial. The only delays for which Jones was responsible came from his desire to be represented by Bailey and, indeed, on two occasions when he was required to choose between Bailey and a speedy trial, he opted for the trial in preference to Bailey. Jones' assertion of his right to a speedy trial is "entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." [10]

The majority concedes that "[t]he record is replete with demands for a speedy trial and motions to dismiss for lack thereof." They assert that "[t]he only evidence contradicting those express demands is of a subtle nature." At the conclusion of their consideration of this evidence of a "subtle nature" they not only accord Jones' assertions no weight, but find, in fact, that the record "rings out the message that Jones did not want to be tried."

As part of the "subtle" evidence establishing that Jones "did not want to be tried," the majority first points to a "procession of attorneys, hired and fired at random," and to "suspicion" raised by Jones' "apparent manipulation of the legal counsel representing him."

Jones was initially represented by Bailey and Alch, Miles and Kroop. Frank, indicated on 25 September 1972, did not then represent Jones. On 11 January 1973, Jones, then represented by Bailey, was tried for escape. Miles was summonsed by both the prosecution and the defense to testify. Jones regarded his testimony as damaging. Miles struck his appearance and Murphy entered his. On 25 May 1973, Jones, having discharged Bailey and Alch for causing inordinate delay, indicated he wanted Miles to represent

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10. Barker v. Wingo, 407 U. S. 514, 531-32, 92 S. Ct. 2182, 2192-93 (1972).

him. Murphy and Kroop struck their appearances. On 7 June, Frank, having been tried and acquitted, entered an appearance as co-counsel with Miles. Miles, indicted on 20 July 1973, struck his appearance on 6 September 1973, leaving Frank, for all practical purposes, as sole counsel. On 9 May 1974, a three judge panel recommended Frank's disbarment, and on 19 June, Frank struck his appearance. By 26 June, Bailey and Alch were again representing Jones, along with Carrier, a local attorney. These attorneys continued to represent Jones until his trial on 11 December.

The facts in this case readily explain the turnover of attorneys. I see nothing suspicious in the order in which counsel entered and struck appearances. Nor do I see any "apparent manipulation" of counsel by Jones. At all times, except for one week between 19 June and 26 June 1974, Jones was represented by local counsel, so that trial could have been set at any time. Moreover, with the exception of the delays occasioned by Bailey, due to his other commitments or the illness of his associate, matters over which Jones had no control, no delay in trial was over occasioned by the "procession of attorneys." The majority's suspicions, are, in my view, unfounded.

As further "subtle" evidence that Jones did not want to be tried, the majority relies upon his participation in plea negotiations and filing of a number of motions. I will not infer from these bare facts that Jones was not prepared and did not intend to go to trial. I do not believe that an accused must forego his right to engage in plea negotiations and make motions to avoid an inference that his insistent, formal demands for speedy trail are insincere.

"But even more compelling" evidence of Jones' desire not to be tried is found by the majority in "the correspondence from [Bailey] expressly negating demands for speedy trial." Originally, Jones' sole motivation for waiving his right to speedy trial was to assure his representation by Bailey, which he was willing to forego when the delay became inordinate. When Miles withdrew because of his indictment, and Frank withdrew because of his recommended disbarment, Jones again resorted to Bailey, and waived his

right to speedy trial to accommodate Bailey's schedule. On this occasion as well, he was willing to forego representation by Bailey when the delay became inordinate. The evidence that during two discrete periods of time, Jones waived his right to speedy trial to secure adequate representation at his trial, does not support an inference that he did not want to be tried during the 14.5 month period of delay attributable to the State.

As the final piece of evidence to establish that Jones did not want to go to trial, the majority relies on Jones' "own proclamation when he eventually came to trial that he was not yet ready for it even then." The record shows that on 11 December 1974, Jones had wanted to present evidence on his motion to dismiss for lack of speedy trial and to present several other motions supported by evidence at the beginning of his trial. A motion to dismiss for lack of speedy trial was argued. During the prosecutor's recounting of the facts, Carrier, Jones' local counsel, interrupted and requested that Jones be permitted to hear the prosecutor's proffer and be given a chance to respond. The court refused because "I am only concerned here with what the State's Attorney demonstrated from his records." Without permitting the prosecutor to conclude his summary of the facts, or Jones to present any facts, the court denied the motion to dismiss for lack of speedy trial. While Bailey had argued the motion to dismiss for lack of speedy trial, he had not called Jones to testify. Moreover, Bailey made no effort to present Jones' other motions, or to summon witnesses to testify concerning them. The relations between Bailey and Jones became strained. Carrier attempted to ease the rapidly developing friction. He failed. The conflict escalated and ended in Jones' explosive statement, set forth in the majority opinion, and his attempted discharge of Bailey. It was Jones' loss of confidence in Bailey's conduct of the trial which precipitated his unruly behavior and led to his removal from the courtroom.

In this context, Jones' statement that he was not prepared to go to trial meant only that he did not want the trial to proceed until his motions had been properly presented,

heard, and ruled upon. His discharge of Bailey was occasioned by a totally unanticipated inability to reach a *modus operandi* with him on the day of trial. Under these circumstances, I do not agree with the majority's conclusion that Jones' assertions that he was unprepared to go to trial on 11 December 1974, indicated that he had not desired and was not prepared to go to trial at any previous time.

The majority, having determined that the record here "rings out the message that Jones did not want to be tried," also concludes that the record "'strongly suggests that [Jones] hoped to take advantage of the delay' to which his actions and the actions of his lawyers had contributed." The facts on which this conclusion rests are neither articulated by the majority nor discernible from the record. Based on this conclusion, the majority reaches for "the *Barker* result," which it offers as a solution. I find *Barker* to be totally inapplicable to the facts of this case.

In *Barker v. Wingo*,[11] the accused and his co-defendant, Manning, were both indicted on a charge of homicide. The State had a stronger case against Manning than it did against the accused and believed that the accused could not be convicted unless the co-defendant testified against him. In order to conclude Manning's trial before trying Barker, thereby removing the barrier of Manning's unwillingness to incriminate himself, the State sought a series of continuances. On 11 occasions between 21 October 1958 and 12 February 1962, Barker agreed to the continuances sought by the State. During that period, no action whatever was taken that could be construed as the assertion of a speedy trial right. On 12 February 1962, Barker made a motion to dismiss for lack of speedy trial. The ground for the motion was not stated and no alternative motion for speedy trial was made. At oral argument counsel conceded that Barker definitely did not want to be tried, and that Barker was gambling on Manning's acquittal, because he thought that since the evidence was not very strong against Manning, if Manning were acquitted, he would never be tried. The

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11. 407 U. S. 514, 92 S. Ct. 2182 (1972).

conclusion that Barker was gambling on Manning's acquittal was also supported by his failure, following his *pro forma* motion to dismiss filed in February, 1962, to object to the Commonwealth's next two motions for continuance. In addition, it was not until March of 1963, after Manning's conviction was final, that Barker, having lost his gamble, began to object to further continuances. Finally, there was no serious prejudice. Indeed, there was not even a claim that any of Barker's witnesses were dead or unavailable at the time of trial. On these facts the court found that Barker was not deprived of his right to a speedy trial, despite a five year delay between his arrest and trial.

In the instant case, Jones never agreed to a postponement proposed by the State. He objected to delays and repeatedly asserted his desire for a speedy trial. There is no evidence that he was gambling on the acquittal of co-defendants. There is no evidence here that he did not want to be tried. Finally, as will be set forth below, there is evidence of actual prejudice of a substantial nature, in that Jones' major alibi witness, Kevin Darby, had died in the interim. Under these circumstances, *Barker v. Wingo* is inapplicable to the instant case.

IV. Prejudice.

In *Epps v. State*,[12] the Court of Appeals considered the question of prejudice from a delay which creates an impairment of an accused's defense. There the court pointed out that as a result of a delay attributable to the State, a witness who had been in attendance on 28 December 1972 when the case originally came to trial, who was then "apparently prepared to testify that the appellant was not at the scene of the robbery," was inducted into the Armed Forces and was serving in Korea at the time of the trial.

At the trial, there was evidence to show that the victim was robbed at about 2 a.m., on 9 August 1972, by three men, one of whom carried a knife and another a stick. Immediately following the incident, the victim ran down the

12. 276 Md. 96.

street. He encountered a policeman to whom he reported the robbery. Cruising with the officer in a police car, the victim, within a brief interval, observed the trio, one of whom was carrying a radio, and another a stick. When the police officer ordered them to "halt," one of the group took flight. The victim was unable to identify the accused as his assailant. Another witness, however, identified the accused as the fugitive.

The accused elected not to testify. Thus, the missing witness would have been the only witness in the accused's behalf. The Court of Appeals said:

> "Although admittedly speculative, the testimony of David Epps might have been sufficient to have generated a 'reasonable doubt' as to his guilt.
>
> "For all practical purposes, any possible defense which the appellant had was obliterated when by reason of the postponement on December 28th he was denied the opportunity of presenting the testimony of his alibi witness. It seems to us that the appellant has demonstrated not only 'the possibility that [his] defense will be impaired,' but has shown, to his prejudice, an actual impairment of his defense." (Citations omitted.)

Here Jones was ultimately tried on four counts of a nine count indictment.[13] At the trial, a police officer testified that on 12 July 1972, at about 5:25 a.m., the police, armed with a valid search warrant, entered a semi-detached home, located at 3703 Trent Road, owned by Jones and his then girlfriend, co-defendant Brenda Lou Pinkett, in which Pinkett lived and which Jones visited on occasion. Substantial quantities of heroin and narcotics paraphernalia were found. Some items were hidden in various places throughout the house. Some were found in "bedrooms." Strainers were found in the

13. These four counts charged that on 12 July 1972, Jones unlawfully possessed heroin; unlawfully possessed heroin with intent to distribute; and unlawfully possessed controlled paraphernalia of two different kinds, with intent to use such items for the illegal distribution of heroin.

kitchen sink. Confectioner's sugar and two packages of Scotch tape, as well as some plastic bags, were found "in the kitchen." At the time of the search, co-defendant Pinkett was present on the premises. Jones was not.

While there was evidence to show that Jones had engaged in narcotics transactions before 12 July 1972, only three witnesses gave testimony which tended to link Jones to the Trent Road premises, and to show that he was in joint possession of the narcotics and paraphernalia found there on 12 July. A police officer said that on 23 May 1972, he saw Jones enter those premises and heard him say to an accompanying male: "Hurry up with that stuff, I want to have it whacked up before daylight." Jessie Parker, a felon with a record of convictions for narcotics related offenses as well as grand larceny, assault and manslaughter, testified that about 7:30 p.m. on 11 July 1972, at the Trent Road house, Jones exchanged narcotics with him for $6,700 in small bills.[14] Finally, another police officer testified that at about 4:20 a.m. on 12 July 1972, he saw Jones, co-defendant Pinkett and an unidentified male come out to the front porch of that residence. Through starlight binoculars, which he felt it necessary to use because he "had never come in contact with Miss Pinkett or Mr. Jones and I had no idea who they were," he saw Jones, carrying a brown paper grocery bag, get into a car and drive off. The police officer "hit the high beams on [his] vehicle to get a good view of the operator." He followed Jones to 18 Kitridge Court, a single family dwelling owned by Jones' brother. After seeing Jones enter the residence, the police officer drove to a location about four or five miles away, waited approximately 30 minutes, returned to 18 Kitridge Court at about 5:25 a.m., where he joined several other police officers armed with a valid search warrant, who forcibly entered the premises. Jones was arrested. Two other unidentified men were then present in the house. No narcotics were found.

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14. A later witness, William W. Carrier, co-counsel for Jones, impeached Parker's testimony by testifying to prior inconsistent statements made by Parker and by specifically testifying that on 11 June 1974, Parker told him that he would testify that he had never engaged in a narcotics transaction with Jones.

At his trial, Jones proffered, with respect to his motion for speedy trial, that co-defendant Kevin Darby, who bore a strong physical resemblance to him,[15] would have testified that he, Darby, and not Jones was at 3703 Trent Road at 4:20 a.m. on 12 July 1972, and that it was he, not Jones, who was observed by the police officer leaving that address and driving to 18 Kitridge Court. This alibi witness was killed in May, 1973.[16] Jones also proffered that another alibi witness, one Joseph Perry, was killed in 1973. Bailey proffered that co-defendant Andrew Strickland, whom Jones had planned to call as a witness in his behalf, had disappeared.

At trial, Jones elected not to testify in his own behalf. No alibi witness did, in fact, appear. The evidence presented to establish Jones' dominion and control over the heroin and narcotics paraphernalia found at 3703 Trent Road on 12 July 1972 was exceedingly thin.[17] Although admittedly speculative, the testimony of alibi witnesses might have been sufficient to generate a reasonable doubt as to Jones' guilt. Thus, for all practical purposes, here, as in *Epps*, Jones' only possible defense was obliterated by the State's delay, particularly by its election to try the escape charge first and its concomitant failure to set a trial between 15 December 1972, when the case was ready, and 5 April 1973.

I disagree with the majority's analysis that even assuming Jones had shown actual prejudice, the majority would not consider the factor of prejudice because the delay was not "the fault of the State." Based upon the record before me, I am convinced that Jones has shown, to his prejudice, an actual impairment of his defense which must be taken into

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15. To show the resemblance, Jones described the *modus operandi* of his escape in July of 1972. He stated that Kevin Darby, a/k/a Kevin Jones, was also arrested on 12 July 1972 and taken to the Baltimore County jail. Bail was set and posted for Darby/Jones. When the institution personnel called the name "Jones," appellant presented himself and was released in place of Darby/Jones.

16. Jones' proffer in this respect was corroborated by the fact that in open court on 25 May 1973, the prosecutor informed the judge that he had learned that Darby had recently been killed. The indictment of Darby was abated by death on 22 October 1974.

17. *See* Garrison v. State, 272 Md. 123, 321 A.2d 767 (1974).

account as a factor in determining whether he was denied a speedy trial.[18]

V. Conclusion.

I agree with the majority that because the remedy of dismissal is so severe "we must be especially careful not to permit legal fictions to obscure our common sense." I also believe that an overzealous concern that whenever a court incorrectly finds a denial of the right to a speedy trial, "a criminal fairly convicted on abundant evidence . . . will be freed," should not blind us to the elemental truth that our judicial process requires that legal questions, particularly constitutional questions, be determined only on facts which can be articulated and discerned, and upon the legitimate inferences adduced therefrom. This requirement is not met in the majority opinion.

The process used by the majority involves first, finding that the facts in the record were inadequate; then supplementing the record with another set of facts arbitrarily limited to those in "our own opinions and in those of the Court of Appeals;" then supplementing the inadequacy of those facts by impermissible inferences; and then failing to make requisite assessments with respect to the length of delay attributable to the State and to Jones, and with respect to prejudice to Jones' defense. On these deficient premises, the majority determines an individual's constitutional rights. I cannot join with my brothers in such a process.

The issue in this case is simple and uncomplicated. The State had the obligation to bring Jones to trial. The facts and inferences legitimately deducible are insufficient to show that the State has met this obligation. Instead, those facts and inferences show that the trial of Jones, who had repeatedly asserted his right to a speedy trial, was delayed for a period of 14.5 months because of the State's election to try cases other than Jones' narcotics charges, the existence of overcrowded dockets, and a total indifference to his

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18. Epps, *supra*, at 26.

asserted right to speedy trial. This 14.5 month delay, which was not caused by sound or legitimate reasons, resulted in actual prejudice to Jones.

John Edward Jones was not convicted on "abundant evidence." Because of the prejudice he suffered as a result of the inordinate delay caused by the State, he was not fairly convicted. He is entitled to be freed. Jones' motion to dismiss should have been granted. Accordingly, I would reverse the judgment of the court below. In view of this result, I would reach no other question.

APPENDIX C

CHRONOLOGY OF THE LIDDIE JONES CASE

7-12-72—Jones arrested.

7-13-72—Jones escapes from Baltimore County Jail & is surrendered thereafter on advice of Atty., F. Lee Bailey.

7-27-72—Jones first indicted for narcotics and escape.

8-21-72—Stephen Miles enters appearance on behalf of Jones.

9-25-72—Robert Frank indicted for attempted bribery.

10-13-72—F. Lee Bailey and Gerald Alch enter appearance on behalf of Jones.

10-13-72—Gerald Kroop enters appearance on behalf of Jones.

10-17-72--Letter from Gerald Alch to Sam Green requesting a two week extension on the deadlines for filing pre-trial motions in both cases.

10-20-72—Pre-trial conference before Judge Proctor attended by Sam Green and Stephen Miles on behalf of Jones. Deadline for filing motions in the narcotics case extended from November 17 to December 1, 1972.

10-25-72—Court orders that all pre-trial motions in narcotics case be filed on or before December 17, 1972.

11-6-72—Jones moves to try narcotics case prior to the escape case. Judge Proctor orders that all pre-trial motions in the narcotics case are to be filed on or before December 3, 1972 and that the trial of the narcotics case will be scheduled no later than December 15, 1972.

11-13-72—Directive issued from the Governor of the State of Maryland ordering investigation of corruption in connection with the Jones case.

11-14-72—The State answers all pre-trial motions filed on behalf of Jones by Stephen Miles.

11-21-72—A hearing held in the escape case. Judge Proctor disqualifies himself.

11-27-72—Jones enters into an agreement that the escape case will be tried first.

11-30-72—Aforesaid agreement filed.

1-2-73—Jones' Motion for a speedy trial filed by Miles.

1-11-73—Jones pleads guilty to escape. Plea bargaining agreement filed.

1-15-73—William Murphy enters appearance on behalf of Jones in the narcotics case.

1-16-73—Stephen Miles informs Sam Green that he has information that Darby is confined to a mental hospital in Philadelphia, Pennsylvania.

1-22-73—Stephen Miles strikes his appearance.

1-29-73—Robert Frank tried for attempted bribery and acquitted.

2-20-73—Jones scheduled to surrender to begin serving escape sentence.

3-2-73—Bailey and Kroop are informed that several pre-trial motions are still pending in the Jones narcotics case.

3-19-73—F. Lee Bailey's office informed of suppression hearing in the narcotics case set for 3-30-73.

3-30-73—Hearing on motion to suppress in the narcotics case. Bailey was present.

4-5-73—Letter to Baltimore County State's Attorney's office from John Truman of F. Lee Bailey's office stating "defense does not demand immediate trial until such time as you are notified to the contrary."

4-9-73—Court overrules motion to suppress.

5-3-73—Federal indictment filed charging Jones with narcotics offenses.

5-25-73—Trial date in State narcotics case set for June 25, 1973. Jones says he wants only Miles as his attorney.

6-7-73—Federal narcotics trial of Jones commences.

7-21-73—Jones convicted in federal court of narcotic offenses and sentenced to 30 years imprisonment.

7-73—Miles indicted for conspiracy with Jones to bribe the office of State's Attorney for Baltimore County.

8-22-73—Maryland Attorney General's Office informs Baltimore County State's Attorney's Office that the Jones narcotics trial would not interfere with the investigation of the Baltimore County State's Attorney's Office under the gubernatorial directive.

9-6-73—Stephen Miles strikes his appearance in the narcotics case.

10-25-73—Samuel Green, Baltimore County State's Attorney, indicted as a result of the ongoing investigation ordered by Governor Mandel.

10-31-73—Louis Irvin, an investigator in Green's office and co-defendant of Green, trial commences.

11-14-73—Jones files speedy trial motion through attorney Frank.

12-26-73—Robert Frank and Baltimore County State's Attorneys Office agreed to trial date of February 26, 1974.

1-10-74—Sam Green trial commences.

2-6-74—Green convicted.

2-8-74—Letter from Judge Proctor removing Jones narcotics case from trial assignment on February 26 due to understaffing of bench as a result of corruption trials.

2-28-74—Writ issued to bring Jones to arraignment on narcotics case. Arraignment scheduled for 3-11-74.

3-1-74—Robert Frank informs State's Attorney's Office that he will be unable to attend arraignment on 3-11-74.

3-74—Miles tried and acquitted.

3-13-74—Jones arraignment reset for 3-26-74.

3-14-74—Writ issued to procure attendance of Jones on 3-26-74.

4-10-74—Arraignment of Jones reset for 4-22-74.

4-19-74—Opinion filed in *State v. Beers,* 21 Md. App. 39, 318 A.2d 825 (1974), initial indictment against Jones defective.

4-29-74—Reindictment of Jones on narcotics charges.

5-7-74—Motion for Severance of Jones from co-defendant's filed.

5-15-74—Severance granted.

5-29-74—Hearing on motion to dismiss for lack of speedy trial. Motion Denied.

6-3-74—Frank indicted for perjury as out growth of investigation ordered by Gov. Mandel.

6-7-74—Pinkett and Strickland, co-defendants of Jones, trial commences.

6-13-74—State's Attorney's office informs F. Lee Bailey that Jones still insists that Bailey represents him.

6-19-74—Frank strikes his appearance on behalf of Jones.

6-21-74—State's Attorney's Office informs F. Lee Bailey's Office of a hearing in the Jones case set for 6-26-74.

6-26-74—William Carrier enters appearance on behalf of Jones. Telegram for Gerald Alch of Bailey's office delivered to Judge Turnbull stating that Jones agreed to waive his right to speedy trial and requesting postponement until after 11-18-74.

10-7-74—Trial date set for 11-18-74.

10-14-74—F. Lee Bailey requests postponement of the trial date set for 11-18-74.

11-11-74—Jones personally objects to the postponement.

11-12-74—Bailey informs Jones, via letter, that he is willing to personally represent him.

11-21-74—Judge Proctor informs Jones that the trial has been postponed until 12-2-74.

12-4-74—Trial begins in Baltimore County.

12-5-74—Mistrial declared. Change of venue granted.

12-11-74—Trial commences in Calvert County. Motion to dismiss for lack of speedy trial denied.

12-13-74—Jury verdicts returned, Jones sentenced.

Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1277.

STATE OF MARYLAND,
PETITIONER,

v.

JOHN EDWARD JONES,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1277.

STATE OF MARYLAND,
PETITIONER,

v.

JOHN EDWARD JONES,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

Brief for Respondent in Opposition.

Opinions Below.

The opinions of the Court of Appeals of Maryland and the Court of Special Appeals of Maryland in the instant case are adequately cited in the petition.

Jurisdiction.

It is submitted that the Court does not have jurisdiction to review the instant case because the decision of the Court of Appeals of Maryland rested on adequate and independent state grounds. The facts and law supporting this contention are developed in Argument I, *infra*.

Questions Presented.

I. Did the Court of Appeals of Maryland correctly decide that the indictment against the respondent must be dismissed because the two-and-one-half-year delay between said indictment and trial prejudiced respondent's defense and denied him his state and federal constitutional right to a speedy trial?

II. If the Court grants the instant writ of certiorari, respondent seeks review of the additional question presented below, the merits of which were not reached by the Court of Appeals of Maryland because of its decision to dismiss the indictment on speedy trial grounds:

Does the Maryland Constitution establishing the jury in a criminal case as judges of law as well as of fact and the trial judge's charge to that effect violate federal constitutional due process requirements binding upon the states?

Constitutional Provisions.

This case involves the Sixth and Fourteenth Amendments of the Constitution of the United States, as reflected on

page 2 of the petition. Also relevant to the question presented in the petition is Article 21, Maryland Declaration of Rights, which provides in pertinent part:

> That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury . . ..

If the Court grants the instant writ and considers question II presented above, Article 15, § 5, of the Maryland Constitution will also be relevant. Article 15, § 5, provides:

> In the trial of all criminal cases, the Jury shall be the Judges of law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

Statement of the Case.

Since petitioner's statement of the case is substantially as presented in the agreed statement of facts included in respondent's brief to the Court of Appeals of Maryland pursuant to Maryland Rules of Procedure, Rule 828(g), respondent does not set forth a separate statement of the case except for the few additions to petitioner's statement provided below:

It must be noted that at several times during the period between the indictment and the actual trial in the instant case the setting of a definite date for trial did not occur. First, at the October 12, 1972, hearing, Judge Proctor of

the Circuit Court of Baltimore County ordered that the trial commence no later than December 15, 1972, but no definite date was set at that time (E. at 6).

At the hearing on November 21, 1972, described in the petition at page 5, Judge Proctor disqualified himself (see transcript of November 21, 1972, hearing).

On January 11, 1973, when the plea bargaining agreement relative to the escape charge was filed, no trial date was set for the narcotics case (which is the subject of the instant petition), despite prior assertions by the respondent and his counsel that the narcotics case should have been tried prior to the escape case.

The record reflects that the respondent was at one point scheduled to go to trial on the narcotics charges on February 20, 1973, the same day that he was scheduled to surrender to state authorities in order to begin serving his sentence (E. at 31). The trial did not, however, take place in February of 1973.

When the respondent was indicted on federal charges in May of 1973, no date had yet been set forth for the narcotics trial; and, in fact, at the May 25, 1973, hearing before Judge Proctor, the judge observed that the state trial had priority over the federal trial (E. at 37, 128, 131-132). At the completion of the federal trial on July 21, 1973, no trial date was set for the state narcotics case.

The record does not reflect a reason why the March 11, 1974, date for arraignment and for the setting of a firm trial date, set by Judge Turnbull, was reset for March 26, 1974.

At the hearing held on May 15, 1974, where a ruling was reserved on respondent's motion to dismiss for lack of a speedy trial, respondent had argued that he was highly

prejudiced by the death of Kevin Darby, a co-defendant who allegedly could have proved the respondent's innocence [*Jones* v. *State*, 29 Md. App. 182, 348 A. 2d 55, 73 (1975) (Davidson, J., dissenting)]. On December 11, 1974, after the commencement of the trial in Calvert County, Judge Perry A. Bowen held arguments on respondent's motion to dismiss for lack of a speedy trial (E. at 172-199). The court was informed during argument of the death of two defense witnesses, Darby and Perry, during the period between original indictment and trial (E. at 178-184), and of the disappearance and unavailability of co-defendant, Andrew Strickland (E. at 197).

In his charge to the jury, trial Judge Bowen instructed that the jury were the judges of both law and fact (E. at 201-202). This charge was duly accepted as violative of federal due process requirements (E. at 213-214).

Argument.

I. The Judgment of the Court of Appeals of Maryland was Based on Adequate State Grounds.

It is respectfully submitted that the Court should deny the petition for writ of certiorari to the Court of Appeals in the instant case because the judgment of the Court of Appeals of Maryland dismissing the indictment against the respondent on the basis of denial of his right to a speedy trial rested on an adequate state ground. It is fundamental that, when adequate and independent state grounds exist, this Court will not review the judgments of state courts because there is absent the federal question necessary to

invoke the jurisdiction of the Supreme Court. *See Hammerstein* v. *Superior Court of California*, 340 U.S. 622, 623 (1951); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945).

Where a state court has decided both state and federal questions, as in the case at bar, review cannot be had if decision of the federal question was unnecessary in light of the disposition of the state question. *See Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487 (1965). Moreover, if the opinion of the state court is ambiguous with respect to whether the issue was decided on federal or state grounds, this Court may dismiss the petition since the burden is on the party invoking the jurisdiction of the Supreme Court to establish that the Court has jurisdiction. *Cf. Stembridge* v. *Georgia*, 343 U.S. 541 (1952).

The decision of the Court of Appeals of Maryland in the instant case is, at the very least, ambiguous as to the actual grounds for its decision, *i.e.*, whether the federal constitutional question or state constitutional question was reached. While, on its face, the decision appears to rest on Sixth Amendment considerations (see Petition, Appendix A, at 5a), a more thorough examination of the opinion reveals that the Court of Appeals relies primarily on its past decisions in *Smith* v. *State*, 276 Md. 521, 350 A. 2d 628 (1976), and *Epps* v. *State*, 276 Md. 96, 345 A. 2d 62 (1975). Both *Smith* and *Epps* find the right to a speedy trial in Maryland ensured to criminal defendants through both the Sixth and Fourteenth Amendments to the United States Constitution and Article 21, § 5, of the Maryland Constitution. *E.g.*, *Smith* v. *State*, 276 Md. at 526.

While the foundation for the state right might closely parallel the federal Constitution and while the Maryland courts may well indeed look for guidance from the federal

judiciary and this Court in interpreting the full scope and effect of the speedy trial guarantee, clearly the state may afford greater protection to criminal defendants than the minimal requirements of the federal Constitution. *See Oregon* v. *Hass*, 420 U.S. 714, 719 (1975). Thus, assuming arguendo that the Court of Appeals of Maryland erred in its application of federal constitutional law to the instant case, this Court would still be without jurisdiction to review the Maryland Court's application of state constitutional law pursuant to which it was determined that the respondent was denied a speedy trial.

II. The Court of Appeals of Maryland Correctly Determined Pursuant to the Applicable Decisions of the Supreme Court of the United States that the Respondent was Denied a Speedy Trial in Violation of his Rights under the Sixth and Fourteenth Amendments.

Assuming arguendo that the petition for writ of certiorari in the instant case properly raises a federal question, thereby enabling this Honorable Court in its discretion to accept jurisdiction, it is respectfully submitted that the Court of Appeals of Maryland correctly applied both the decisions of the Supreme Court of the United States and Maryland precedent in reaching the conclusion that the respondent's Sixth Amendment right to a speedy trial (and the corresponding Maryland constitutional right) was violated during the two-and-one-half-year delay between the respondent's indictment and his trial.

The petitioner concedes that the two-and-one-half-year delay does compel a reviewing court to apply the balancing test prescribed under *Barker* v. *Wingo*, 407 U.S. 514, 530

(1972) (Petition, at 15). What the petitioner does contend is that the Court of Appeals, after an exhaustive review of a very lengthy record, erred in attributing eleven months of delay* "substantially, if not entirely, to the State's dilatoriness." *Jones* v. *State*, 279 Md. 1, 367 A. 2d 1, 6 (1976) (Petition, Appendix A, at 6a).

Basically, petitioner seeks to discredit the findings of the Court of Appeals of Maryland primarily on two fronts: first, by claiming that the court totally failed "to counterbalance the deliberate delays of twelve and six months by Jones" (Petition, at 18), and, second, by asserting that the delays attributed to the State were unintentional (Petition, at 18-19). Both these contentions are unfounded. The Court of Appeals' determination that the eleven-month delay was "overwhelmingly chargeable to the State" (Petition, Appendix A, at 12a) came only after a careful examination of the remaining eighteen months. The eighteen-month period of delay was not viewed as having resulted solely or even significantly from the respondent's intentional actions but rather from neutral reasons for which the respondent certainly cannot be held responsible and from actions of the respondent which were not dilatory but, in most instances, were concessions in order to obtain the counsel of his choice for trial.

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*In her dissent, Judge Davidson of the Court of Special Appeals of Maryland attributed fourteen and one half months of the delay to the state. *Jones* v. *State*, 29 Md. App. 182, 348 A. 2d 55, 74 (1975) (Davidson, J., dissenting) (Petition, Appendix B, at 56a). The discrepancy between the findings of the Court of Appeals and Judge Davidson is caused only by the different approaches employed by each, *i.e.*, the majority of the Court of Appeals divided the two and one half years into three broad time periods while Judge Davidson examined shorter time intervals to determine to whom the delay was attributable.

The petitioner strenuously urges that the respondent should be held responsible for the period of delay which resulted when the State chose to try various prosecutors and defense attorneys for alleged corruption supposedly connected with the respondent's cases. The Court of Appeals closely reviewed this contention and concluded that the explanation proffered by the State was "no more than a concocted diaphanous smoke screen" (Petition, Appendix A, at 9a), because the State, at the time these events were occurring, had indicated that these proceedings would not interfere with respondent's trial and because the respondent, repeatedly asserting his right to a speedy trial, had, at all times, an attorney (not under investigation) who was ready to go to trial.

The instant petition thus reduces itself to a request to review the independent *findings of fact* made by the Court of Appeals of Maryland. Petitioner claims that the state court improperly applied decisions of this Court to the facts of the instant case, yet fails to substantiate that claim. Petitioner further insinuates that Maryland court decisions are in conflict with federal authority on the speedy trial issue, yet no state cases deviating from the standards applied in the relevant decisions of this Court are cited. Indeed, the decision of the Court of Appeals that the respondent was denied a speedy trial is in complete accord with decisions of this Honorable Court. *See, e.g., Dickey* v. *Florida*, 398 U.S. 30 (1970). For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

III. The Court of Special Appeals of Maryland Erred in its Determination that the Respondent's Due Process Rights were Not Violated by the Maryland Constitutional Provision Establishing the Jury in Criminal Cases as the Judges of Law as Well as of Fact and the Trial Judge's Charge to the Same Effect.

Respondent respectfully submits that, if this Honorable Court grants the instant petition for writ of certiorari, the following issue raised by respondent in both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland should be reviewed: Whether the Maryland Constitution, establishing the jury in a criminal case as judges of the law as well as of fact, and the trial judge's charge in the instant case to that effect are violative of federal constitutional due process requirements binding upon the states.

The Court of Special Appeals answered this question in the negative, relying on prior decisions of the Court of Appeals of Maryland (Petition, Appendix B, at 45a). The Court of Appeals, having dismissed the indictment on the speedy trial issue, found it unnecessary to resolve the second issue (Petition, Appendix B, at 2a, n. 1). Clearly, this Honorable Court would have jurisdiction to review the constitutionality of Article 15, § 5, of the Maryland Constitution, and indeed said review may be had by direct appeal pursuant to 28 U.S.C. § 1257(2) since the validity of a provision of the Maryland Constitution was upheld in the face of a challenge claiming that said provision is repugnant to the Constitution of the United States.

The issue raised herein has yet to be decided by this Honorable Court. While, as early as 1895, the Court held that determinations of law were clearly within the province

of the judge in the federal courts, *Sparf* v. *United States*, 156 U.S. 51 (1895), the Court later held that nothing in the Constitution of the United States requires a state to maintain the line between the functions of the jury and those of the Court. *Chicago, R.I. & P.R.* v. *Cole*, 251 U.S. 54, 56 (1919).

Every state except Maryland now adheres to the federal rule presented in *Sparf*. Indeed, more recent decisions of the Court and the lower federal courts have recognized that the function of the jury as triers of fact *only* is fundamental. *See, e.g., Delli Paoli* v. *United States*, 352 U.S. 232, 242 (1957); *Ex parte United States*, 101 F. 2d 870, 874 (7th Cir. 1939).

Respondent further submits that, from an historical perspective, the function of jurors as triers of fact and *not* of law is an integral part of the constitutional right to a jury trial now binding on the states. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Even if this were not so, it is respectfully submitted that to allow juries generally to determine the law, as does the Maryland Constitution, is to permit possible violations of a criminal defendant's rights which are guaranteed by the federal Constitution and binding on the states through the Fourteenth Amendment.

The Maryland practice at issue is in direct conflict with the modern concept of due process guaranteed by the Fourteenth Amendment, the elements of which were certainly not recognized at the time the decision in *Chicago, R.I. & P.R.* was rendered. The trial judge in the case at bar, as in all criminal cases in Maryland, only advised the jury of the presumption of innocence, of the reasonable-doubt standard and that no unfavorable inference could be drawn from the respondent's failure to testify. Clearly, each of these principles, if not recognized by a jury, would violate the Fourteenth Amendment. *See In re*

Winship, 397 U.S. 358, 364 (1970); *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Chapman* v. *California*, 386 U.S. 18 (1967).

The very fact that the jury in the instant case was not required to adhere to these federal constitutional standards supports the notion that the respondent did not receive a fair trial. That Article 15, § 5, of the Maryland Constitution permits, or indeed compels, this result requires that the provision be struck down as repugnant to the Fourteenth Amendment to the Constitution of the United States. For this reason, respondent respectfully prays that, if the writ of certiorari is granted in the instant case, this Honorable Court also review the issue presented above.

Conclusion.

Based upon the foregoing reasons and authorities, respondent respectfully submits that the petition for writ of certiorari should not be granted, and, if it is, that this Honorable Court also review the issue presented above in Argument III.

Respectfully submitted,

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